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**VOLUME 1**

**HEARING**

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P R O C E E D I N G S

(Open court, defendant present)

THE COURT: At this time we'll be on the record in Cause Number WR-75828-02, which is the number in the Court of Criminal Appeals. The local cause number -- Writ Number is C-3-011020-1042204D, Ex Parte Paul David Storey. This will be a hearing conducted by the Court pursuant to the order of the Texas Court of Criminal Appeals from April 7<sup>th</sup> of 2017.

Are both sides ready to proceed at this time?

MR. WARE: The Applicant is ready, Your Honor.

MR. BRAGG: The State is ready, Your Honor.

THE COURT: All right. And just for the record, the Applicant Paul David Storey appears to be present in the courtroom.

You are Mr. Storey; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

I think before we start, both sides maybe had some things for the record; is that correct?

MR. HAMPTON: Yes, Judge. After our conference call last Wednesday I think it was --

THE COURT: I think it was actually

1 Thursday.

2 MR. HAMPTON: Thursday, all right. Well,  
3 that would explain what else I'm going to say to you.

4 After that hearing, you denied the motion  
5 to stay proceedings. I filed such a motion in the Court  
6 of Criminal Appeals pretty much within the hour. And I  
7 don't quite know what happened, but as 4:45 on Friday  
8 approached and I didn't hear anything, I called the court  
9 and essentially there was no ruling. I just asked should  
10 I book a room to be in Fort Worth on Monday morning and  
11 the answer was yes. So here I am. And as we stand here,  
12 there's still no ruling on the motion to stay.

13 THE COURT: I believe that's correct. I  
14 believe the clerk has actually checked this morning, and  
15 counsel may be aware, also may have checked, and there's  
16 no ruling from the Court of Criminal Appeals.

17 MR. HAMPTON: I don't expect it until this  
18 afternoon because they conference in the morning on  
19 Mondays and that's where they're at. They're in the room  
20 debating other things.

21 THE COURT: All right.

22 MR. HAMPTON: The other is the matter that  
23 is pending at the Court of Criminal Appeals, it's occurred  
24 to us, is -- actually can be solved by this court. The  
25 essence of the argument for the Court of Criminal Appeals

1 is that the present attorney pro tem, Mr. Bragg, who is an  
2 assistant attorney general, is conflicted in only one very  
3 narrow way, which is the interaction with clemency.

4 Our -- well, my entry into this case was in  
5 clemency. The federal court appointed us to pursue  
6 clemency. So we did, we had hearings, we had meetings,  
7 and so forth. That is still ongoing.

8 There is a solution that you could provide  
9 that would moot out that writ of prohibition altogether.  
10 And you don't have to do it now, but it's something worth  
11 considering, which is to appoint a different attorney  
12 pro tem to handle clemency. That solves the whole  
13 problem.

14 So if you do that, if you pick -- and if  
15 you read the writ of prohibition, it's short, but it's to  
16 the point, which is this is -- this is about the  
17 expression of the elected district attorney of Tarrant  
18 County who represents Tarrant County before the Board of  
19 Pardons and Paroles. So if you appointed what I would  
20 urge to be a local attorney who is qualified to be an  
21 attorney pro tem in terms -- in matters of our interfacing  
22 with the executive branch of government where the Board of  
23 Pardons and Paroles is, you remove my entire argument. So  
24 it's just worth considering. Thought I'd throw it out  
25 today, which is my first opportunity.



1           The other thing that is about to be filed  
2   -- okay, it has been filed. We have a motion to prevent  
3   the State from arguing lack of due diligence when it is  
4   our contention that it was the State that kept the  
5   evidence of the Cherrys' viewpoint from the Defense. So  
6   it makes various arguments.

7           Now, you don't have to rule on that. We  
8   will ask for a running objection to any questions that --  
9   at the first opportunity one of us will object. But it  
10   will be at the end of the proceedings that you will want  
11   to make a decision on that because you will have heard the  
12   evidence. And we will ask for an order of an affirmative  
13   finding not on credibility but on whether or not you  
14   believe that Tim Moore, Bob Ford, and Bill Ray acted with  
15   due diligence, and Larry Moore acted with due diligence,  
16   and if so, you can make that finding.

17           Otherwise, we are ready -- oh, yeah. Well,  
18   because the writ is pending, we want to preserve our writ  
19   even -- unless you want to decide that right now, we're  
20   going to object on the basis that we've got a pending  
21   motion in the Court of Criminal Appeals and these  
22   proceedings should not occur until after that decision is  
23   made.

24           THE COURT: Well, the Court's going to  
25   overrule that last objection that you have. I know you

1 wish to preserve any error or document your record. So  
2 I'll overrule that objection.

3 With respect to your first suggestion that  
4 the Court appoint an additional district attorney pro tem,  
5 that would just be -- that would be in addition to counsel  
6 that's already been appointed?

7 MR. HAMPTON: No, it would replace him in  
8 terms of being the decision maker about any matters before  
9 the Board of Pardons and Paroles and the governor. Any --  
10 any executive branch of government.

11 THE COURT: Okay.

12 MR. BRAGG: If I may, Your Honor.

13 THE COURT: That would be a limited  
14 purpose?

15 MR. HAMPTON: Exactly.

16 THE COURT: Does the State have any  
17 response?

18 MR. BRAGG: Oh, I was just going to quickly  
19 say, Your Honor, the Court has actually decided this issue  
20 already before there was even a hearing present -- back  
21 when we were doing clemency the first time for the first  
22 execution date. In fact, they filed a writ of mandamus in  
23 the CCA based on that decision. That writ was mooted out.  
24 But the Court's already decided this issue.

25 THE COURT: I was personally unaware of

1       that, but the suggestion has been made. I'm willing to  
2       consider it but without any promises.

3                       MR. WARE: Your Honor, if I could, because  
4       I do have some history with that issue in the case.  
5       The -- back in -- well, earlier this year before we  
6       filed -- I believe before we filed clemency, before we  
7       filed this writ, there was an ex parte hearing that we  
8       were not a part of in which the former judge in this case,  
9       who's now recused himself, heard the district attorney's  
10      ex parte motion that the office be recused, and as part of  
11      that, I guess, attendant to that ex parte hearing, which  
12      we were not a part of, appointed the Attorney General's  
13      Office, Mr. Bragg as the attorney pro tem prosecutor.

14                     That had all happened before we got any  
15      word of it. We were not participants. We did not have an  
16      opportunity to object.

17                     So then, since we were in the clemency  
18      stage of this, it came up, well, okay, they're appointed,  
19      and I think even Mr. Bragg had some confusion. He had  
20      sent me an email that he was only appointed pro tem for  
21      the judicial matters and the writ hearing. And so we were  
22      trying to figure out, well, who stood in the statutory  
23      shoes of the district attorney for purposes of the  
24      clemency proceedings because the district attorney's  
25      office is one of the court officers in the clemency

1 proceedings, namely clemency proceedings by statute, so we  
2 had a motion to clarify at which point we objected.

3 We said, you know, that the former judge,  
4 Catalano, who's now recused himself, did not have  
5 jurisdiction to recuse the district attorney's office from  
6 an executive proceeding which was not even pending in his  
7 court. I mean, he could recuse them from the matter  
8 pending in his court, but the executive proceeding is not  
9 even a judicial proceeding and he did not have the  
10 authority.

11 So we asked for a motion for clarification,  
12 at which case at this point the Attorney General's Office  
13 decided they were a part of the order for executive  
14 purposes as well, and Judge Catalano agreed with them and  
15 said, okay, I'm not going to -- I'm appointing y'all for  
16 the executive and clemency proceedings as well. The  
17 district attorney's office is recused from the executive  
18 clemency proceeding as well. So that was over our  
19 objection.

20 We still disagree with that. I don't think  
21 he's got the authority or power to recuse the sheriff or  
22 the district attorney or the trial judge from the clemency  
23 proceedings. Of course, he's, at this point, I guess he's  
24 the trial judge, but he's recused himself. I guess that  
25 would make this court the trial judge at this point.

1                   So we're re-urging that and asking this  
2                   court to consider, as Mr. Hampton said, appointing an  
3                   attorney pro tem for purposes of the clemency proceeding.

4                   MR. HAMPTON: It's a more limited motion.  
5                   Mine was far more global, which is to completely remove  
6                   the Attorney General's Office for all purposes. But upon  
7                   reflection, it occurred to me that you've got the  
8                   authority as well. And it is actually far more -- it is  
9                   really very limited to our interactions with the executive  
10                  branch of government and the Board of Pardons and Paroles  
11                  that can then make a recommendation to the governor. So  
12                  it's really two pieces of that branch of government. So I  
13                  thought I'd suggest it at the outset.

14                 THE COURT: Well, and I appreciate and  
15                 understand the distinction that's being made. And thank  
16                 you, Mr. Ware, for the history on that. That all occurred  
17                 before I came in the case. Is there anything the State  
18                 wants to add to that?

19                 MR. BRAGG: Just, Your Honor, that I have  
20                 never seen the division of labor amongst the district  
21                 attorney's office like that in a capital case such as  
22                 what's being suggested. I think it would be the first  
23                 time ever that that had occurred. And, of course, we  
24                 would, for the reasons that we stated before, we would  
25                 just say that that's not what the statute contemplates.

1           The statute contemplates and actually  
2 provides that we step in the shoes of the district  
3 attorney's office and that in the capital case, that would  
4 be there's no -- there's no carve-out in the statute,  
5 there's no exceptions written into the statute, so the  
6 statute by its plain language seems to contemplate when we  
7 stepped into the shoes of the district attorney as  
8 district attorney pro tem, it is then for all matters that  
9 that office would handle in that particular case.

10           THE COURT: All right. I think I  
11 understand the position that both sides have at this  
12 point. I think the purpose of the hearing today is to  
13 develop whatever needs to be developed with respect to the  
14 issues that the Court of Criminal Appeals has directed  
15 that need to be resolved.

16           And -- and the last thing, Mr. Hampton, you  
17 brought up and you made reference to is actually a motion  
18 to preclude the State from contending that counsel failed  
19 to exercise due diligence in ascertaining the Cherrys'  
20 opposition to Paul David Storey's execution. That's the  
21 document and the motion that you --

22           MR. HAMPTON: Exactly, Judge. And I argued  
23 a variety of the equitable arguments to be made, and  
24 that's for your -- to be taken under your consideration.

25           THE COURT: I'm now aware of the motion

1       that was just filed at 8:53 this morning. The State  
2       received a copy of this as well?

3               MR. BRAGG: We just received a copy of this  
4       as they were proceeding to the court, Your Honor.

5               THE COURT: All right. Very well.

6               Mr. Ware, you had mentioned a few minutes  
7       ago off the record that there was a witness that you had  
8       subpoenaed that you had agreed to release from the  
9       subpoena; is that correct?

10              MR. WARE: Yes, sir. That's Mitch Mitchell  
11       with the Star-Telegram, Your Honor.

12              THE COURT: All right.

13              MR. WARE: I don't know if he's present or  
14       not.

15              THE COURT: I don't see him. But at any  
16       rate, you're not going to call him as a witness?

17              MR. WARE: That's correct.

18              THE COURT: Very well.

19              All right. Is there anything else for the  
20       record before we proceed further?

21              MR. WARE: Your Honor, the only thing is  
22       there are several witnesses here in the courtroom, and I  
23       think some of them can be excused until this afternoon.  
24       The Court can put them under the Rule or whatever the  
25       Court prefers. If they could all, you know, maybe be on

1 one-hour standby.

2 THE COURT: All right. And I know we've  
3 already excused three or four witnesses --

4 MR. WARE: Yes, sir.

5 THE COURT: -- as well. Do you have a  
6 batting lineup of witnesses?

7 MR. WARE: Well, Your Honor, Dr. Cherry and  
8 Mr. Cherry are here in the courtroom, and we would not be  
9 putting them on until this afternoon. So -- but I know  
10 that the State subpoenaed them as well. So I didn't know  
11 if the State was willing to let them go until then.

12 MR. BRAGG: Yeah, that's perfectly fine,  
13 Your Honor. There were certain witnesses that were  
14 subpoenaed by both sides. We agree that they are -- it's  
15 at the discretion of the Applicant as to when they want to  
16 call them for purposes of their case.

17 THE COURT: And that's fine. I'm agreeable  
18 to whatever y'all are agreeable to. There are a lot of  
19 people here in the courtroom, including several attorneys.  
20 If you want to release some of them until later, that  
21 would be fine. But you would know the order that you --

22 MR. WARE: Yes. And Cory Session is here  
23 as well, Your Honor, and he can be released until this  
24 afternoon. And Bill Ray and Tim Moore can be released  
25 until this afternoon. Mark Daniel we may call this



1 morning. We may not get to him this morning, but as long  
2 as he can be here within an hour, then we're good with  
3 that.

4 THE COURT: All right.

5 MR. BRAGG: If we could, Your Honor, before  
6 we release anybody, we would ask that all witnesses be  
7 placed under the Rule.

8 THE COURT: Well, the Court will go ahead  
9 and impose the Witness Rule at this time.

10 So will all witnesses who are here at this  
11 time who anticipate being called as witnesses, if y'all  
12 will please stand at this time and be sworn.

13 If each of you would raise your right  
14 hands.

15 (Ten witnesses sworn)

16 THE COURT: All right. And just for the  
17 record, I'll just have everyone state their name for the  
18 court reporter so we have a record who's been sworn.

19 Mr. Daniel.

20 THE WITNESS: Mark Daniel.

21 THE WITNESS: Tim Moore.

22 THE WITNESS: Larry Moore.

23 THE WITNESS: Bill Ray.

24 THE WITNESS: Jena Parker.

25 THE WITNESS: Christy Jack.

1 THE WITNESS: Robert Foran.

2 THE WITNESS: Cory Session.

3 THE WITNESS: Judith Cherry.

4 THE WITNESS: Glenn Cherry.

5 THE COURT: All right. I believe those are  
6 the witnesses who have been sworn. And I guess the  
7 Witness Rule has been invoked, so only the witnesses  
8 testifying will remain in the courtroom during the  
9 hearing.

10 MR. WARE: Yes, sir. We would ask for one  
11 exception, and that is our paralegal Jena Parker. She's  
12 going to be helping with papers and such during the  
13 hearing, and her sole -- she may not testify as a witness.  
14 Her sole role as a witness, she was present when I  
15 interviewed Mr. Foran several months ago. And if there's  
16 -- in case there is a discrepancy, she may be called as a  
17 witness as to what was said in that interview.

18 THE COURT: Is there any issue with --

19 MR. BRAGG: As long as that's -- as long as  
20 that is a proffer as to what she will testify to and the  
21 only thing that she will testify to, we don't have any  
22 objection, Your Honor.

23 THE COURT: Very well. I'll permit that  
24 then.

25 MR. WARE: Thank you, Your Honor.

1                   THE COURT: Obviously, I think everybody  
2 here knows the meaning of the Witness Rule. Don't discuss  
3 the case and wait to be called. So I'll recess y'all out  
4 in the hallway. Those that have been excused until later,  
5 just stay in contact.

6                   MR. BILL RAY: Judge, could I get a  
7 two-hour notice if it's possible? I've got a detention  
8 hearing on a juvenile charge of murder in Wise County and  
9 I've moved it until this afternoon. I'm going to see if I  
10 can move it to some other time. If I knew kind of what  
11 time I was going to testify.

12                  THE COURT: Mr. Ware, are you aware of the  
13 schedule?

14                  MR. WARE: It would -- once again, I'm  
15 sorry, I wasn't listening. It would be mid-afternoon.  
16 What are you saying? You've got --

17                  MR. BILL RAY: I've got a juvenile who's  
18 got a detention hearing. He's charged with murder in Wise  
19 County. They moved it to 3:00 o'clock because I was  
20 subpoenaed to be here at 9:00. I'm going to see if they  
21 can move it to another time. If they can't, they can't.

22                  MR. WARE: Okay. Well --

23                  MR. BILL RAY: If I could just have a  
24 couple of hours' notice.

25                  THE COURT: He wants a two-hour notice.

1 MR. WARE: Sure, that's fine. And I think  
2 we're anticipating this may go over until tomorrow.

3 MR. BILL RAY: Do I need to be here at  
4 1:00 o'clock?

5 MR. WARE: Just be within two hours.

6 MR. BILL RAY: Okay.

7 THE COURT: All right.

8 MR. DANIEL: Judge, can I ask this. I know  
9 we're under the Rule, but I'm going to take care of some  
10 other things. Can I at least walk in and maybe tap  
11 Mr. Hampton on the shoulder and say when do y'all need me  
12 and then go right back out? Would that be okay?

13 THE COURT: Is there any problem with that?

14 MR. BRAGG: No objection.

15 THE COURT: It appears that would be fine,  
16 Mr. Daniel.

17 MR. LARRY MOORE: Judge, may I go upstairs?  
18 I can be down in two minutes.

19 THE COURT: Thank you, Mr. Moore.

20 MS. JACK: Would you like us just out in  
21 the hallway?

22 THE COURT: That will be fine. I'm not  
23 sure who the first witness will be. But if you haven't  
24 been mentioned yet, I guess stay real close.

25 (Witnesses leave courtroom)

1 (Discussion off the record)

2 THE COURT: All right. Back on the record  
3 this morning. I believe most of the witnesses have  
4 excused themselves from the courtroom.

5 So, Mr. Ware, do you have a witness to call  
6 at this time?

7 MR. WARE: If I can just make a brief  
8 opening statement, Your Honor.

9 THE COURT: Very well.

10 APPLICANT'S OPENING STATEMENT

11 MR. WARE: As the Court knows, the Court of  
12 Criminal Appeals stayed the scheduled execution, which was  
13 scheduled for April the 12<sup>th</sup>, and remanded to the trial  
14 court to decide initially whether the grounds that we've  
15 raised really could have been, the factual basis of the  
16 grounds that we've raised, could have been discovered  
17 through due diligence of the attorneys, all the previous  
18 attorneys up to this point.

19 And if so, if the attorneys up to this  
20 point were not duly diligent -- and that would be Larry  
21 Moore, Bill Ray, Bob Ford, and really John Stickels who  
22 had the case on direct appeal -- if through due diligence  
23 they could have found the factual basis of this claim, of  
24 the claims that we've made, then they're saying it's  
25 waived.

1                   And we anticipate that, number one, all of  
2                   those attorneys will say they did not know of the factual  
3                   basis. Really, the factual basis of the claim is that  
4                   Jonas Cherry, the victim in this capital murder case, his  
5                   parents, Dr. Cherry -- Judith Cherry and Glenn Cherry were  
6                   at all times now, at all times prior to this horrible  
7                   murder, and at all times in between were opposed to the  
8                   death penalty. In general and in this case, they were  
9                   opposed to Paul Storey getting the death penalty.

10                  These attorneys will testify, I anticipate,  
11                  that that was -- and the State knew it. The State was  
12                  aware that Judith Cherry and Glenn Cherry were opposed to  
13                  the death penalty before this case went to trial, and that  
14                  they never disclosed that to either Bill Ray or Larry  
15                  Moore or John Stickels or Bob Ford, and that the fact that  
16                  they did not know it and did not discover it was not a  
17                  lack of due diligence on their part. That's what we  
18                  anticipate the testimony is going to show, it was not a  
19                  lack of due diligence on their part.

20                  So, in essence, the State is charged with  
21                  convincing this court if these individuals get on the  
22                  stand and testify they weren't told, which I anticipate  
23                  they will, either that they're lying and they were told or  
24                  that they're incompetent. And if they had just used due  
25                  diligence -- it's not even effective assistance of

1 counsel, it's a due diligence -- if they'd just used due  
2 diligence, they would have discovered that the victim's  
3 parents were against the death penalty.

4 And we anticipate, you know, proving  
5 evidence -- putting on evidence otherwise, both directly  
6 and through lawyers who know these lawyers, who knew Bob  
7 Ford, about how diligent they were.

8 And then we've got, really, four claims  
9 that the Court -- we anticipate the Court will get to,  
10 substantive claims. And they're all oriented around,  
11 well, two things: One, that this information was never  
12 disclosed to the Defense; and, two, that the prosecutor in  
13 this case exploited the fact that this information had not  
14 been disclosed and, in fact, argued the opposite to the  
15 jury during final argument that Jonas Cherry's family,  
16 which of course would include Judith Cherry and Glenn  
17 Cherry, his parents, and everyone who loved him believed  
18 the death penalty in this case was appropriate. That was  
19 the argument she made. It's just not true.

20 And that -- those two facts together, the  
21 nondisclosure and the argument as we've laid out in our  
22 writ, violated the Eighth Amendment and the Fourteenth  
23 Amendment. And based on -- based on the totality of the  
24 circumstances, we're asking that this court make a  
25 recommendation that the death sentence be vacated.

1                   With that, we're ready to call our first  
2                   witness.

3                   THE COURT: All right. Will the district  
4                   attorney pro tem have any opening statement in response at  
5                   all?

6                   MR. BRAGG: Just a brief one, Your Honor,  
7                   if I may.

8                   THE COURT: Very well. You may proceed.

9                   RESPONDENT'S OPENING STATEMENT

10                  MR. BRAGG: First of all, to clarify for  
11                  the Court, the due diligence that's going to be most at  
12                  issue with regard to the procedural bar -- because as the  
13                  Court's aware, the CCA has remanded this case not only for  
14                  factual determinations on the merits of the four claims  
15                  but also on the procedural issue as well. The due  
16                  diligence that's considered or contemplated in that  
17                  statute is really the due diligence of initial state  
18                  habeas counsel, that being the late Bob Ford.

19                  Regarding the two precepts that opposing  
20                  counsel laid out, we anticipate there will be testimony  
21                  that discusses what exactly the Cherrys' family's feelings  
22                  were at the time of the punishment phase of the hearing.  
23                  We also believe that there will be testimony regarding  
24                  what exactly the conversations were between the State and  
25                  between defense counsel, trial counsel that is.



1                   And finally, I'd like to just clarify for  
2                   the Court that the nature of the proceedings in this case,  
3                   the State does not have the burden now. Now the burden is  
4                   on the Applicant to convince you, one, that it was not a  
5                   lack of due diligence on Mr. Ford's part to be able to  
6                   raise this claim in his initial state habeas writ; and,  
7                   two, of the underlying merits of the case should this  
8                   court reach or go beyond the procedural bar to the merits.  
9                   It's their burden to convince you otherwise.

10                  So with that said, Your Honor.

11                  THE COURT: All right. Thank you.

12                  MR. WARE: Your Honor, with one  
13                  clarification. What the statute clearly says is  
14                  discovered on or before the time the first State writ was  
15                  filed. That date is, I think, May 26<sup>th</sup>, 2010. But it's  
16                  not limited just to the State writ counsel. It's all  
17                  counsel prior to that -- that cutoff date. That's the  
18                  clear language of the statute. So that's why we're  
19                  calling trial -- among other things, why we'd be calling  
20                  trial counsel, etcetera.

21                  THE COURT: All right. Both sides, I'm  
22                  sure, will want to fully develop any record that needs to  
23                  be developed. With that, Mr. Ware, you may proceed in  
24                  calling your first witness.

25                  MR. WARE: Your Honor, we call Christy

1 Jack.

2 THE COURT: All right. Christy Jack.

3 (Witness enters courtroom)

4 THE COURT: Step up. You may be seated.

5 Of course, you've already been sworn as a witness.

6 I'm not sure if that microphone is on. It  
7 doesn't appear to be. My switch up here isn't working.

8 THE WITNESS: I'll try to speak up.

9 THE COURT: All right. At this time I  
10 don't have a way to turn this microphone on, so speak up  
11 if you will.

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: Most of the attorneys I don't  
14 think will have a problem speaking up.

15 Mr. Ware, you may proceed.

16 MR. WARE: Thank you, Your Honor.

17 ELIZABETH CHRISTINA JACK,  
18 having been previously duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. WARE:

21 Q. Ms. Jack, state your name for the record.

22 A. My name is Elizabeth Christina Jack.

23 Q. And, Ms. Jack, you're an attorney in private  
24 practice here in Fort Worth, Texas; is that correct?

25 A. I am.

1 Q. I'm sorry?

2 A. I am.

3 Q. Okay. And you in the not too distant past were  
4 also, well, were actually an assistant district attorney  
5 in the Tarrant County District Attorney's office; is that  
6 correct?

7 A. I was an assistant district attorney with the  
8 Tarrant County District Attorney's office from roughly  
9 November of 1991 through February of 2015.

10 Q. Okay. That's how many years?

11 A. Almost 24 years.

12 Q. Okay. So -- and you've been -- so you've been  
13 in private practice since that time?

14 A. I've been in private practice. I took off a  
15 couple of months after leaving the DA's office, and I  
16 believe I began my practice in April of 2015. And so I've  
17 been in private practice for roughly two-and-a-half years.

18 Q. And you received a subpoena to be here in court  
19 today; is that correct?

20 A. I did. I did.

21 Q. A subpoena deuces tecum to bring any documents  
22 you had in your possession related to the case; is that  
23 correct?

24 A. Yes.

25 Q. Did you have any documents in your possession

1 related to the case?

2 A. Related to the trial --

3 Q. To the case we're here about today, the trial of  
4 Paul Storey.

5 A. No.

6 Q. Okay. So any documents that you may have had or  
7 generated or seen, were they all left at the district  
8 attorney's office when you left?

9 A. Well, one of the things that you asked me before  
10 we began this morning was whether or not I had any  
11 documents, and I explained to you that I had crafted  
12 somewhat of a timeline as best as I could in anticipation  
13 of that -- of this hearing.

14 Q. But that's something you created after you left  
15 the district attorney's office?

16 A. Yes.

17 Q. Okay. Here fairly recently, I guess?

18 A. Yes.

19 Q. Okay. So when you left the district attorney's  
20 office, or even while you were there, did you take -- did  
21 you ever take any documents related to the Paul Storey  
22 case out of the district attorney's office?

23 A. No.

24 Q. Did you ever destroy any of the documents  
25 related to the Paul Storey case?

1           A.     No.

2           Q.     Okay. I mean, do you take trial notes, for  
3 example?

4           A.     Yes.

5           Q.     Okay. What would have happened to those, for  
6 example?

7           A.     Well, it depends upon whether or not they were  
8 included within the -- if I took trial notes, it would  
9 have been when a witness was testifying as to thoughts as  
10 to what I wanted to ask them on cross. I don't know that  
11 those notes were kept.

12          Q.     What would you have done with them? Would you  
13 have left them with the district attorney's office or  
14 destroyed them or taken them home with you?

15          A.     I would not have taken them home with me. They  
16 may not have been included in the capital file with the  
17 district attorney's office.

18          Q.     So where would they be?

19          A.     I would not know. They may or may not have been  
20 included in the file.

21          Q.     And if they're not, what would you have done  
22 with them?

23          A.     I don't know that I would have done anything  
24 with them.

25          Q.     Okay. Well, I mean, they're your notes. Did

1     you destroy them or --

2           A.     I don't know what would have happened to them if  
3     they're not with the file.

4           Q.     Okay.  You've looked through the file, have you  
5     not?

6           A.     I have roughly gone through the file for a  
7     couple of hours.

8           Q.     Okay.  You didn't see your trial notes in there,  
9     did you?

10          A.     I did not.

11          Q.     Okay.  Or even your voir dire notes, you take  
12     notes during jury selection, voir dire?

13          A.     We do.

14          Q.     Those were not in there either, were they?

15          A.     They were not.

16          Q.     And you don't know what happened to those?

17          A.     Generally voir dire notes, it depends.  Some of  
18     the notes are returned to the court as a matter of  
19     security for purposes of the veniremen.

20          Q.     Do you think that's what happened in this case?

21          A.     I do not know.

22          Q.     Okay.  But then that should have been part of  
23     the official file, should they not?

24          A.     I can't speak to that.  I don't know what  
25     happened to my notes.

1 Q. Is it possible you destroyed them?

2 A. No, I would not have destroyed them.

3 Q. You just don't know where they are --

4 A. I don't know where they are. Sometimes --

5 Q. -- or what you did with them?

6 A. Sometimes they're taken on the back of  
7 questionnaires. And if those questionnaires are shredded  
8 at the conclusion of voir dire, for security purposes,  
9 then my notes would have been shredded.

10 MR. WARE: May I approach, Your Honor?

11 THE COURT: You may.

12 Q. (BY MR. WARE) Do you have more than one copy of  
13 the timeline?

14 A. No, I do not.

15 Q. May I just look at it?

16 A. Certainly.

17 Q. Let me ask you -- let's go ahead and go through  
18 a timeline, some of which may be included in what you put  
19 down, some of which may not be, some of which you may not  
20 know.

21 The murder itself, I guess, took place in  
22 October of 2006; is that correct?

23 A. That is correct.

24 Q. Okay. And there were actually two defendants  
25 charged -- arrested and charged with this offense, is that

1 correct, this capital murder?

2 A. That is correct.

3 Q. And that was also in October of 2006?

4 A. I know that the offenses occurred in October of  
5 2006. It's my understanding that both were arrested and  
6 charged that same month.

7 Q. Okay. And you know that, I mean, whether you  
8 knew then, you know now, that Bill Ray was appointed as  
9 Mr. Storey's first chair; is that correct?

10 A. I do.

11 Q. Also in October of 2006?

12 A. I believe that's correct.

13 Q. Okay. You were not involved in the case at that  
14 point?

15 A. I was not.

16 Q. Okay. But you'd had considerable capital trial  
17 experience, had you not?

18 A. Well, I had tried at that point four capital  
19 cases I believe at that point.

20 Q. Okay. Four death penalty cases?

21 A. Let me back up for just a minute. At the time  
22 that I tried this case, I had tried to their conclusion  
23 four death penalty capital cases. I would have to go back  
24 and look specifically at the timeline in 2006 to say  
25 whether or not I had tried Juan Segundo yet.



1 Q. And so how did you become involved in this case?  
2 When and how did all that come about?

3 A. I believe it was the end of 2007 or the  
4 beginning of 2008. And as near as I can recall, it's more  
5 likely the beginning of 2008 Robert Foran approached me  
6 and asked me if I would be willing to be co-counsel on  
7 this case.

8 Q. Now, you actually knew the Cherrys before any of  
9 this ever happened; is that correct?

10 A. I did.

11 Q. Y'all were neighbors for a while?

12 A. I was actually neighbors with Mr. Cherry's -- I  
13 don't know if it was his mother or his sister. I believe  
14 it was his mother, and so that's actually who was my  
15 neighbor.

16 Q. Okay. So you were acquainted with them before  
17 the -- before this terrible tragedy even happened; is that  
18 correct?

19 A. That's correct.

20 Q. Okay. How long had you known them?

21 A. Oh, I don't know that I would consider knowing  
22 them. I do --

23 Q. Acquainted with?

24 A. Acquaintances. My husband and I lived in a  
25 house over on Stadium Drive, and that would have been when

1 we were first married. So that would have been in 19-- we  
2 married New Year's Eve of 1993. So that would have -- at  
3 the -- so are you asking me how long had I known the  
4 Cherrys at the time --

5 Q. Yes, how long had you been acquainted?

6 A. Let's see, '93 to '03 (sic), so some 15 years.

7 Q. Okay. At the time that the murder occurred?

8 A. Oh, no, I'm sorry, 13 years at the time of the  
9 murder. I thought you were asking at the time I became  
10 involved in the case.

11 Q. So that's the first time anybody had approached  
12 you about even being involved in the trial itself or the  
13 prosecution itself was late in 2007 or early 2008?

14 A. I really think it was the beginning of 2008.

15 Q. How did all that come about? How did that come  
16 about that you were approached to become involved in the  
17 case?

18 A. Well, as I understand it, Robert was going to  
19 try the case with Greg Miller. And I'm not sure what  
20 happened, but there was a point in time that Greg was no  
21 longer going to try the case. I don't know why. And  
22 Robert approached me.

23 Q. What did he say?

24 A. He said -- let me think how -- the conversation.  
25 I think it was along the lines that he was going to try

1 the case with Greg and that Greg for whatever reason was  
2 not going to be able to try it, and he asked me if I was  
3 interested in trying it.

4 Q. And you said you would?

5 A. And I said I would.

6 Q. And so what was the -- what was the first thing  
7 you did once you got on the case?

8 A. I have no idea what the first thing was I did.  
9 I probably read the case to begin with because it wasn't a  
10 case -- when he said Paul Storey or Mark Porter, those  
11 were not names that stood out to me.

12 Q. And had -- you're familiar with a policy or an  
13 entity, a practice that the district attorney's office had  
14 -- who was the district attorney back then? It was still  
15 Tim Curry, was it not?

16 A. In 2008 -- I believe Joe Shannon was appointed  
17 by the governor, I believe, around 2009, I believe. So  
18 yes, Tim Curry would still have been the district  
19 attorney.

20 Q. And there was a practice in the office at the  
21 time, in and around that time, for deciding which cases  
22 would be tried for the death -- which capital cases would  
23 be tried for the death penalty and which would be waivers.  
24 And by waiver I mean what would be tried as what we call a  
25 mini cap, right?

1           A.     Right.

2           Q.     A mini cap meaning that if they're convicted,  
3     it's automatic life without parole?

4           A.     Well, for part of the time when the law changed  
5     because before we had life without parole, there was a  
6     regular capital life sentence. And that longstanding  
7     policy was in effect during both those time periods.

8           Q.     Okay. But in any event, if the death penalty  
9     was waived, the outcome if there was a conviction would be  
10    life in prison, however that was defined at the particular  
11    time?

12          A.     That's right.

13          Q.     I'm sorry, you may have said --

14          A.     That's right.

15          Q.     So there was a practice in the office at the  
16    time you were there, maybe still, I don't know, but at  
17    least at all relevant times where there was, what, a death  
18    penalty panel or committee would meet and, however often,  
19    and talk about the various capital cases and decide which  
20    ones -- or at least make a preliminary determination which  
21    ones should go forward as a death penalty case and which  
22    ones should be tried as a mini cap, as I say, as a life --  
23    as a waiving the death penalty; is that correct?

24          A.     That is correct.

25          Q.     Okay. And do you know who was on that

1 committee?

2 A. It depended on -- it was different at different  
3 times. I can tell you generally the positions that  
4 comprised the death committee.

5 Q. Please.

6 A. Okay. From the years that I was involved with  
7 capital litigation, and there were times that I served on  
8 the death committee, there were times that I did not serve  
9 on the death committee, there were times that I had voted  
10 on the death committee.

11 The death committee in general was  
12 comprised of the first assistant of the office, and for  
13 most of that time that would have been Alan Levy; all of  
14 the deputy chiefs, and there were generally four to five  
15 deputy chiefs, and the individuals that were the deputy  
16 chiefs differed depending on what time it was; the head of  
17 the appellate section. And then I believe what would  
18 be --

19 Q. Who would that have been?

20 A. The head of the appellate section at the time?

21 Q. Yes.

22 A. Well, it would have been Chris Marshall at one  
23 point.

24 Q. But during this time.

25 A. During this time that --

1           Q.     Well, whenever Paul Storey and Mark Porter's  
2 case went in front of the death committee. Do you know  
3 who was head of appellate at that time?

4           A.     I can tell you who was head of the appellate  
5 section at the time, and that would have been Chuck  
6 Mallin.

7           Q.     Okay.

8           A.     And I believe that the parallel to the first  
9 assistant probably would have been Chip Wilkinson, so he  
10 might have been the assistant chief. But I don't really  
11 know back then what his title was.

12          Q.     Okay. Were you on Paul Storey and Mark Porter's  
13 death -- death penalty panel?

14          A.     I do not believe I was.

15          Q.     But you do not recall?

16          A.     I don't think I was because when Robert  
17 approached me the names did not stand out to me.

18          Q.     So had the death penalty committee already met  
19 on Paul Storey and Mark Porter when he approached you  
20 whenever that was?

21          A.     It was my understanding that they had.

22          Q.     That's not on your timeline. You don't know?

23          A.     Well, I wasn't -- I was not a part of the  
24 presentation of the case. I was not -- I don't believe  
25 that I was a member of the committee at the time. And so

1 when the death committee meets, there's not really a  
2 formal notification of the court when they convene or when  
3 they vote.

4 And so my timeline is comprised really of  
5 events from the transaction section of the mainframe; in  
6 other words, events that I could cobble together from the  
7 clerk's office and then events that I knew of personally.  
8 And so because -- because the death committee's convening  
9 would not have been reflected in the clerk's office,  
10 there's really not a way for me to go and assign a date to  
11 it. On top of the fact that I'm no longer a member of the  
12 district attorney's office, I do not have access to those  
13 records.

14 Q. Okay. Do those records exist as far as you  
15 know?

16 A. Well, I've been out of the office for  
17 two-and-a-half years. Well, actually longer than that  
18 now.

19 Q. You looked through the district attorney's file,  
20 did you not?

21 A. I looked through the district attorney's file,  
22 but I don't know that records of the death committee's  
23 meeting are typically included in the district attorney's  
24 file.

25 Q. Why would they have segregated out?

1           A.     I have no idea.

2           Q.     I mean, if one would file an open-records  
3 request asking for the entire file, that would include --  
4 it seems -- stands to reason that would include any notes  
5 concerning the death panel committee. They're part of the  
6 district attorney's records, are they not?

7                   MR. BRAGG: At this point, objection, Your  
8 Honor. She's already testified she doesn't know what the  
9 procedures were regarding the keeping of these notes from  
10 the death committee, if there were any notes.

11                  THE COURT: I'll sustain the objection at  
12 this time.

13           Q.     (BY MR. WARE) Well, let me see if I can get you  
14 to answer my question. You didn't see any death committee  
15 notes in the district attorney's file that you went  
16 through?

17           A.     I did not.

18           Q.     Okay. And you don't know whether you were on  
19 the committee or not in Paul Storey's case?

20           A.     I do not believe I was. And I do not believe I  
21 was present when the case was presented to that committee.

22           Q.     But you believe it was presented prior to the  
23 time that Robert Foran approached you?

24           A.     Yes.

25           Q.     Had a decision already been made to seek death?



1           A.     Yes.

2           Q.     Well, that would imply that the committee had  
3 already met?

4           A.     Right.

5           Q.     So what was your understanding of what the  
6 committee actually decided in talking to, you know -- you  
7 don't remember if you were there or not, you think you  
8 weren't, but certainly you talked to Robert about things.  
9 Did he ever tell you what had happened at the committee  
10 and why they decided to proceed with death --

11          A.     He did not.

12          Q.     -- in Paul Storey's case? I'm sorry?

13          A.     He did not.

14          Q.     He never did.

15                   Was Mark Porter's case presented at the  
16 same time as far as you know to the death committee?

17          A.     Well, it would stand to reason that they would  
18 both be presented at the same time. But again, I cannot  
19 speak to whether or not they in fact were.

20          Q.     You don't know for sure that you weren't on the  
21 committee, you just don't have any memory of it, so assume  
22 that you weren't on the committee; is that correct?

23          A.     That's correct.

24          Q.     So if you were on the committee, there's  
25 absolutely nothing that stands out in your mind about this

1 case or about what was discussed in front of the  
2 committee?

3 A. Well, no, I would not say that. There are a  
4 number of things that stand out in my mind.

5 Q. I mean, that was discussed at the committee.

6 A. That's correct.

7 Q. Okay. Did -- did Robert tell you at that time  
8 that -- that the committee had authorized him or y'all to  
9 offer Paul Storey a life sentence?

10 A. Did Robert -- would you repeat your question,  
11 please?

12 Q. When did you find out, if you did, that the  
13 committee had authorized Robert, or whoever is prosecuting  
14 the case, to offer Paul Storey a life sentence?

15 A. I don't know that the committee authorized  
16 Robert to offer a life sentence.

17 Q. Okay. But they may have, you just don't know?

18 A. They may have. I don't know. I don't think  
19 they did.

20 Q. Okay. When did you find out that -- or, I mean,  
21 he was offered a life sentence at some point, was he not?

22 A. He was.

23 Q. What -- did you have to go through a process  
24 before you were authorized to offer a life sentence once  
25 it had been decided evidently by the committee to go for

1 death?

2 A. Generally speaking, when the district attorney's  
3 office makes the decision to seek the death penalty, as a  
4 chief we would have, generally speaking, have had to  
5 approach a deputy chief or the district attorney or the  
6 first assistant to discuss our thoughts about the possible  
7 disposition of the case.

8 Q. Okay. And so do you remember when you offered  
9 life?

10 A. I know that a life sentence was offered, as I  
11 recall, in the spring of 2008.

12 Q. Do you remember the process you went through or  
13 Robert went through or who you talked to before that was  
14 authorized?

15 A. I believe that either Robert or Robert and I  
16 talked to Bob Gill. I believe that.

17 But it might have been that Robert talked  
18 to Alan.

19 Q. Well, would you have been part of that  
20 conversation whoever it was y'all talked to?

21 A. I may or may not have been a part of that  
22 conversation. Robert and I were chiefs in different  
23 courts. And as a result, we had supervisory  
24 responsibilities and trial responsibilities in each of our  
25 respective courts.

1           Q.     All right.  So you're not exactly sure --  
2     somebody had to talk to somebody, correct, before you or  
3     Robert offered a life sentence?

4           A.     That would have been -- that's how I would have  
5     handled a capital case, if the death committee had  
6     authorized or had voted to seek death, yes.

7           Q.     Well, I guess what I'm asking is, how did you  
8     handle it in this case?  Did Robert get someone's  
9     permission to do it?  Did you get someone's permission to  
10    do it?  Did you both get someone's permission to do it?  
11    And who was that person and when was it?

12          A.     It's my belief that Robert got authorization.  
13    I'm not entirely sure as to whether that came from Bob  
14    Gill or from Alan or who it came from.  But that's my  
15    belief.

16          Q.     Okay.  Did you know at that time that you  
17    sought -- or you or Robert sought authorization to offer a  
18    life sentence -- and, once again, you said the offer you  
19    believe was actually made in the spring of 2008, correct,  
20    to the best of your recollection?

21          A.     I believe it was made in April.

22          Q.     Of 2008, that you actually made the offer?

23          A.     I think Robert actually conveyed the offer.

24          Q.     Conveyed it to either Larry Moore or Bill Ray?

25          A.     Yes.

1 Q. And was a life offer made to Mark Porter?

2 A. Yes.

3 Q. At about the same time, was this all kind of  
4 one -- one deal?

5 A. I want to say yes, that life sentences were  
6 offered to both of them at the same time.

7 Q. Okay. And Mark Porter's attorneys were Mark  
8 Daniel and Tim Moore; is that correct?

9 A. That's correct.

10 Q. So we've got Larry Moore representing Paul  
11 Storey, Tim Moore representing his co-defendant Mark  
12 Porter?

13 A. Larry Moore and Bill Ray represented Paul  
14 Storey. Tim Moore and Mark Daniels (sic) represented Mark  
15 Porter.

16 Q. It's your recollection that they were both  
17 offered a life sentence at or about the same time?

18 A. That's my recollection, but I would defer to  
19 Robert's recollection of that.

20 Q. Okay. How much before that time that you  
21 actually made the offer was you or Robert, or both of you,  
22 were y'all authorized to offer the life sentence?

23 A. I don't know.

24 Q. Could it have been months?

25 A. It may have been, but I don't think it was that

1 long.

2 Q. Could it have been a year before that, maybe?

3 A. I don't know.

4 MR. BRAGG: Objection, Your Honor, she's  
5 already said she doesn't know.

6 MR. WARE: I'm just exploring a little bit.

7 THE COURT: I'll permit exploration of an  
8 answer.

9 Q. (BY MR. WARE) Could it have been a year before  
10 that?

11 A. I don't think so. I don't even think it was a  
12 matter of months. I think it was a short time before the  
13 life sentences were conveyed.

14 Q. Okay. Now, I mean, could it have been as early  
15 as when the death panel met?

16 A. Could the life sentences have been offered?

17 Q. The authorization for a life sentence.

18 A. I don't believe so.

19 Q. But could have been?

20 A. I don't believe so.

21 Q. Okay. At some point you became aware that  
22 Judith and Glenn Cherry were opposed to the death penalty;  
23 is that correct?

24 A. That they had a general opposition to the death  
25 penalty, yes.

1 Q. Okay. When did you become aware of that?

2 A. I believe that either Robert or Suman told us.

3 Q. Well, that's how you found out. But when did  
4 you find out?

5 By the way, Suman is -- was Jonas Cherry's  
6 wife that became his widow; is that correct?

7 A. Yes, Suman was Jonas Cherry's widow.

8 Q. Yes. Okay. Just for the record.

9 Okay. So when was that that Robert told  
10 you that? Or that Suman told you that?

11 A. I believe it was also in the spring, but I'm not  
12 positive about that timeframe.

13 Q. Spring of 2008?

14 A. Yes.

15 Q. Do you remember the Cherrys themselves ever  
16 telling you that?

17 A. I have a recollection of a meeting with Suman  
18 and the Cherrys, and I remember Robert explaining the  
19 process and the decision that the office had made and that  
20 a life sentence would be conveyed. And -- and I don't  
21 recall being in that meeting the entire time. In other  
22 words, I don't remember if I was there for the entire  
23 time; in other words, did the Cherrys talk to Robert  
24 before I walked into the room. So I don't know that they  
25 actually verbalized to me at that meeting that they were

1       opposed to the death penalty.

2           Q.       Do you know when that meeting was on your  
3       timeline?

4           A.       I do not.

5           Q.       It's not on your timeline?

6           A.       It's not.

7           Q.       Would it have been -- would that have been  
8       before you offered the life sentence?

9           A.       It's my recollection, yes.

10          Q.       That meeting was before you offered the life  
11       sentence?

12          A.       (Moving head up and down).

13          Q.       I'm sorry?

14          A.       Yes, it's my recollection it would have been.

15          Q.       Do you know how much before you offered the life  
16       sentence?

17          A.       No.

18          Q.       Or spring, fall, year?

19          A.       (Moving head side to side).

20          Q.       Okay. But in any event, it would have been  
21       prior to whenever it was in the spring of 2008 that you  
22       offered the life sentences?

23          A.       Yes.

24          Q.       Okay. And so Robert and/or Suman told you that  
25       the Cherrys were opposed to the life sentence, and that's



1       how you knew, correct?

2           A.     Yes.

3           Q.     Although you were at a meeting with the Cherrys  
4       and Suman and Robert and they may have told you at that  
5       meeting?

6           A.     They may have, yes.

7           Q.     But you don't know when that was?

8           A.     I do not.

9           Q.     It was just earlier in the timeline?

10          A.     Yes.

11          Q.     And did that enter into part of the reason or  
12       part of the -- of your thinking in offering a life  
13       sentence to Paul Storey and Mark Porter?

14          A.     It entered into part of my thinking, yes.

15          Q.     What about Robert's?

16          A.     I can't speak for Robert.

17          Q.     Well, y'all discussed it, didn't you?

18          A.     Yes. Of course, we would have discussed it.

19          Q.     Okay. Well, what did y'all discuss?

20          A.     What did we discuss about why we would offer a  
21       life sentence?

22          Q.     Right. And the Cherrys being opposed to a death  
23       sentence.

24          A.     I think that was a part of the discussion. I  
25       think part of the discussion was the fact that Paul Storey

1       also did not have any adjudicated criminal history.

2           Q.       Okay.

3           A.       And as heinous as this capital murder was, it  
4       was one of the most premeditated capital murder cases I've  
5       ever been involved in, because of his lack of adjudicated  
6       criminal history, because of his age, I mean --

7           Q.       Because of his what?

8           A.       His age, he was relatively young.

9           Q.       Okay.

10          A.       I think all of those things went into our  
11       consideration in offering a life sentence.

12          Q.       Okay. But within that calculus -- I mean, there  
13       were other things as well. Within that calculus was the  
14       fact that Glenn Cherry and Judith Cherry were against the  
15       death penalty; is that correct?

16          A.       It was for me, and I think that's part of the  
17       reason why for me we left the life sentence on the table  
18       as long as we did.

19          Q.       Now, did you discuss the fact that the Cherrys  
20       were against the death penalty with other people in the  
21       office? You discussed it with Robert, obviously. You  
22       discussed it, I guess, with Suman. Were there other  
23       people in the office you discussed that with?

24          A.       I don't have any specific recollection outside  
25       of Bob Gill.

1 Q. Okay. You discussed it with Bob Gill?

2 A. Yes.

3 Q. At what point did you discuss it with him on the  
4 timeline, do you know?

5 A. I don't know.

6 Q. Do you have any idea?

7 A. Well, I think it would have been all around that  
8 same timeframe.

9 Q. Spring of 2008?

10 A. Spring --

11 Q. Or prior?

12 A. Yes.

13 Q. Did you make any -- you didn't make a memorandum  
14 to yourself or any note or anything regarding that,  
15 regarding becoming aware that the Cherrys were against the  
16 death penalty?

17 A. No.

18 Q. And how that would enter into your decision to  
19 offer life or anything like that?

20 A. I did not.

21 Q. Okay. So the fact that I didn't see anything  
22 like that in the DA's file is because it's not there; is  
23 that correct?

24 A. It's not --

25 Q. The fact that I didn't see any memorandum --

1 THE COURT: One at a time.

2 THE WITNESS: I'm sorry. I --

3 Q. (BY MR. WARE) The fact that I didn't see any  
4 memorandum from you to yourself in the file or anything  
5 about the Cherrys' feelings about the death penalty, the  
6 fact that I didn't see that in the file is because it's  
7 not there, as far as you know?

8 A. Well, it's because I don't recall ever making  
9 one.

10 Q. Okay. Is Bob Gill you think the only person in  
11 the office you discussed this with?

12 A. No. I think Ashlea Deener.

13 Q. Who's Ashlea Deener?

14 A. Ashlea Deener was, I believe, a second-year law  
15 student at the time.

16 Q. An extern?

17 A. An intern.

18 Q. Or intern.

19 A. She might have been an extern. She might have  
20 been an extern, because she might have been interning for  
21 credit for law school.

22 Q. Okay. So you discussed this -- the fact that  
23 the Cherrys were against the death penalty with her?

24 A. Well, I think that there was a conversation or  
25 two about it.

1           Q.     Well, it seems extraordinary, doesn't it? I  
2     mean, it's, you know, a little unusual for the victim's  
3     parents to be against the death penalty in a capital  
4     murder case, as you say, a premeditated capital murder  
5     case such as this. That's pretty extraordinary, is it  
6     not?

7           A.     I think in my experience it is the only time  
8     that that has happened.

9           Q.     Okay. And so that's -- would naturally give  
10    rise to conversation between you and Robert, you and your  
11    extern, and perhaps others as well?

12          A.     Yes.

13          Q.     Okay. Did you talk to anybody else about it?

14          A.     I may have.

15          Q.     But you don't know?

16          A.     Specific conversations with specific people do  
17    not come to mind.

18          Q.     Okay. Did -- did you decide at some point --  
19    well, let me ask you, what did you tell Ashlea Deener  
20    about? What was the conversation between you and Ashlea  
21    Diener?

22          A.     I think part of the conversation -- she was  
23    there for, I think, one meeting, and it's hard to remember  
24    how often she was there, how many witness meetings she was  
25    present for, because she was in law school at the time so

1 she wasn't there every single day.

2 I remember one of the conversations that I  
3 had with her involved, you know, how would you handle  
4 something like that and me explaining that perhaps one of  
5 the options would be not to sponsor them as witnesses.

6 Q. And, in fact, as it turned out, y'all didn't  
7 sponsor them as witnesses; is that correct?

8 A. We did not. They were on our witness list,  
9 however.

10 Q. So did you ever disclose this information to any  
11 of the Defense or to anybody?

12 A. Okay. Let me start first with Mark Porter. I  
13 did -- I'm sorry. You look like that's not the way you  
14 wanted me to start.

15 Q. Well, you know, I mean, if that's -- if that's  
16 the way you're prepared to start, go ahead and start that  
17 way.

18 A. Well, then I'll just simply answer your  
19 question. And that is, yes, we did disclose it.

20 Q. I'm sorry?

21 A. I said, then I'll simply answer your question,  
22 yes, it was disclosed.

23 Q. Okay. So let's start with -- start with Paul  
24 Storey and his attorneys. Who disclosed to Larry Moore,  
25 let's say, that Paul -- excuse me, that Jonas Cherry's

1 parents were opposed to the death penalty? Was that you,  
2 was it Robert, was it both of you, or was it somebody  
3 else?

4 A. Robert disclosed it to Bill Ray on a number of  
5 occasions.

6 Q. So nobody disclosed it to Larry Moore, in answer  
7 to my question?

8 A. No, that's not what I was going to say.

9 Q. Okay. Well, my question is, who disclosed it to  
10 Larry Moore?

11 A. It was discussed during jury selection. It was  
12 made reference to during jury selection. There is not an  
13 official disclosure during jury selection nor apparently  
14 was there one on the record.

15 Q. Okay. Well, let me ask you. It's a pretty  
16 simple question. Who disclosed that information to Larry  
17 Moore?

18 A. What I can tell you is that Robert disclosed it  
19 to Bill Ray. There was several conversations.

20 Q. Okay. Were you present -- were you present  
21 during those disclosures?

22 A. No, I was not. But Robert would tell me about  
23 the conversations that he had with Bill Ray.

24 Q. Okay. Well --

25 A. And --

1           Q.     Let me break this down a little bit.  So you  
2 never disclosed it to Larry Moore, correct?

3           A.     When you say a disclosure, I consider it a  
4 formal disclosure.  I never made a formal disclosure,  
5 though it was discussed in jury selection and it was made  
6 reference to.

7           Q.     Was it disclosed -- was Larry Moore there?

8           A.     As I recall, all four of us were there in jury  
9 selection.

10          Q.     Okay.

11          A.     But --

12          Q.     So these discussions where you're talking about  
13 the Cherrys being against the death penalty, they should  
14 be part of the trial record?

15          A.     No.

16          Q.     Okay.  So they're not part of the trial record?

17          A.     They are not part of the trial record.

18          Q.     Okay.  So let's go back and keep it simple.  Who  
19 told Larry Moore, if you know, that the Cherrys were  
20 opposed to the death penalty?  Who told him?

21          A.     As I recall, in jury selection there were  
22 discussions and there were conversations, there were  
23 times --

24                   MR. WARE:  I'm going to object as  
25 unresponsive, Your Honor.



1           Q.    (BY MR. WARE)  If you don't know if anybody ever  
2   told him, then that's fine to say.

3                    I'm asking do you know -- do you know who  
4   told him, if anybody?

5           A.    There were discussions during jury selection in  
6   between the veniremen coming in about the Cherrys' general  
7   opposition to the death penalty.  There were references  
8   made to that topic as well.  We discussed people's  
9   feelings about the death penalty.  Larry and I both  
10  discussed our own feelings about the death penalty.

11                   Am I positive that all four of us were in  
12  the room when those discussions were had?  No, I'm not  
13  positive.  Am I positive that Bill Ray was in the room?  
14  No, I'm not positive.  There were a number of discussions  
15  that took place in between veniremen that are not on the  
16  record.

17           Q.    I understand.  But the ones I'm interested in,  
18  the ones you've testified here under oath took place were  
19  the ones that obviously are not on the record and  
20  obviously there's no written account of.  The ones where  
21  you and Larry Moore and whoever else were discussing the  
22  fact that the Cherrys were opposed to the death penalty,  
23  when was that, who was there, do you know if those even  
24  took place?

25           A.    I know that they took place.

1 Q. Were you there?

2 A. Was -- are you talking about the discussions  
3 during jury selection?

4 Q. You brought up jury selection. So yeah,  
5 discussions during jury selection about the Cherrys being  
6 opposed to the death penalty, were you there when those  
7 discussions took place?

8 A. I was there.

9 Q. Who else was there?

10 A. I don't recall if it was all four of us, meaning  
11 Robert, me, Larry, and Bill, or whether it was Larry and  
12 me or whether it was Bill and me, or whether it was Robert  
13 and me and Bill. I don't recall. I remember those  
14 conversations taking place. I remember us talking about  
15 our feelings about the death penalty. This is the second  
16 death penalty case that I had tried with Larry.

17 Q. And what exactly did those discussions entail?

18 A. We talked about my feelings about the death  
19 penalty. In fact, that I am a supporter of the death  
20 penalty, that Larry is an opponent of the death penalty,  
21 an ardent opponent of the death penalty. We talked about  
22 the Cherrys being opposed to the death penalty.

23 Q. So is that the first time it came up or had it  
24 been disclosed to them prior to these discussions?

25 A. Had Robert had these conversations with Bill

1 prior to this? Yes.

2 Q. Do you know when that took place?

3 A. When Robert first began having his discussions  
4 with Bill, no, I do not.

5 Q. You and Robert hadn't talked about that?

6 A. About when he first told them?

7 Q. Right.

8 A. No, I don't recall asking him that, no.

9 Q. So would there have been anybody else present  
10 during these discussions during, you know, I guess during  
11 the break -- I guess this would have been during the  
12 breaks of voir dire. It wasn't discussions in front of  
13 the juror, obviously.

14 A. Right.

15 Q. And would they have taken place in the courtroom  
16 or where would they have taken place?

17 A. They could have taken place any -- any area  
18 around that courtroom. There are times -- I'm sorry.

19 Q. And who else would have heard these discussions  
20 other than the four of y'all?

21 A. Well, there could have been a court reporter.  
22 As I recall, we had two different court reporters at  
23 times. A court reporter might have been there, although I  
24 don't think there was.

25 I mean, these were conversations that took

1 place when maybe we got there early in the morning, we  
2 were waiting for everyone else to assemble, when we were  
3 waiting for veniremen to come, you know, when jury  
4 selection stops (sic) down and you're left with an hour or  
5 two window. It could have been outside when we're  
6 talking. It could have been as we returned after lunch.

7 Q. But there was never a time when you approached  
8 Larry Moore or Bill Ray and said, there's something I need  
9 to tell you, the --

10 A. No.

11 Q. I'm sorry. You have to answer out loud.

12 A. Oh, I'm sorry. No.

13 Q. And to finish my question, you correctly  
14 anticipated it, but finish my question for the record,  
15 when you said, I need to disclose something to you, the --  
16 Judith Cherry and Glenn Cherry, who incidentally you had  
17 known for many years, are against the death penalty.

18 A. If you're asking me if there was ever a formal  
19 declaration?

20 Q. Yes.

21 A. Or a formal pronouncement?

22 Q. Yes.

23 A. That I was a part of, no.

24 Q. Well, okay. Counsel says I'm making too much of  
25 the word "disclose." Did you ever tell them, just, you

1 know, it doesn't have to be a formal disclosure, was there  
2 ever a time when you just told them, when you broke the  
3 news to them?

4 A. Well, it wasn't a matter of breaking the news to  
5 them.

6 Q. Well, they didn't know it at first. They didn't  
7 go into it knowing it, did they?

8 A. Robert had already had discussions with Bill.

9 Q. Okay. That's your understanding?

10 A. That is my understanding.

11 Q. You weren't there for them?

12 A. I was not.

13 Q. Did -- and you don't know when that took place?

14 A. I do not.

15 Q. Okay.

16 A. I know that my -- I'm sorry, I didn't mean to be  
17 nonresponsive.

18 Q. I'm sorry?

19 A. I didn't mean to be nonresponsive. I'm sorry.

20 Q. Okay. Well -- and it was -- you believed it was  
21 important that the Defense know that, right?

22 A. I believed that they should know that, yes.

23 Q. Okay. Why did you think they should know it?

24 A. Well, our office had been one, and this is how I  
25 grew up, that we give the Defense everything.

1           Q.     And this was -- this was not just part of  
2 everything, this was pretty extraordinary, was it not?  
3 That the parents of the victim in the case that y'all were  
4 seeking the death penalty were actually against the death  
5 penalty, that's pretty extraordinary, isn't it?

6           A.     Well, it's the first time that it had happened  
7 in any case that I was involved in.

8           Q.     Okay. And the last time that it happened in any  
9 case you were involved in, correct?

10          A.     Yes.

11          Q.     One last question along those lines. Did you  
12 convey in any way, whether disclosure, written, or  
13 otherwise, to the defense lawyers that the Cherrys were  
14 against the death penalty before jury selection?

15          A.     I did not.

16          Q.     Okay. Did Robert?

17          A.     I do not believe he did.

18          Q.     Did you and Robert discuss that it was important  
19 to tell defense counsel about the Cherrys' opposition to  
20 the death penalty?

21          A.     We discussed it and we believed that the Defense  
22 should be told that information, yes.

23          Q.     Did y'all discuss it with anyone else about the  
24 disclosure?

25          A.     I believe we discussed it with Bob Gill.

1 Q. Okay. The --

2 A. The reason I say I believe is because I believe  
3 I was present for that discussion. I believe I was  
4 present for that discussion.

5 Q. Okay. And so you had enough question about it  
6 that you asked someone what you should do about it?

7 A. I don't think it was considered Brady, and I  
8 don't think it's considered Brady, but we --

9 Q. Well, my question is, you had enough question  
10 about disclosure that you consulted someone else as to  
11 whether you should disclose it?

12 A. I don't know that it was a question of whether  
13 or not we should disclose it. I think it was just a  
14 matter of telling Bob these are our thoughts and we're  
15 going to disclose it.

16 Q. Well, if you were going to disclose it, why did  
17 you need to get his input before you disclosed something?

18 A. Because he was the deputy chief.

19 Q. Okay.

20 A. And because lots of times we'll talk to, in the  
21 course of trying cases, legal issues.

22 Q. And he said disclose it, did he not?

23 A. Well, it wasn't like we were asking him should  
24 we or should we not, it was just kind of talking through  
25 it.

1 Q. And he recommended that you disclose it?

2 A. We were going to disclose it.

3 Q. I'm sorry?

4 A. We were going to disclose it.

5 Q. And he recommended that you disclose it. He was  
6 on board with that? He agreed to that?

7 A. I think he agreed with us, yes.

8 Q. Okay. And do you remember when that  
9 conversation was? I think I asked earlier.

10 A. I think you did.

11 Q. You don't know?

12 A. I don't.

13 Q. Do you have an approximation?

14 A. Probably the spring, but that's -- that really  
15 is an approximation.

16 Q. What about -- what about Mark Porter's  
17 attorneys? Mark Daniel and Tim Moore, did you likewise --  
18 or did you, Robert, or anyone else tell them? And they  
19 were representing, obviously, the co-defendant Mark  
20 Porter. Did you tell -- I mean, the Cherrys were likewise  
21 against the death penalty for Mark Porter as well?

22 A. They had general opposition in both cases, yes.

23 Q. So when did you dis-- when did y'all disclose  
24 that to them?

25 A. Well -- but your question, I think, was, did I



1 disclose that to Mark Daniels (sic) or Tim Moore.

2 Q. Well, that wasn't my question, but we'll go  
3 there.

4 A. I'm sorry.

5 Q. We'll go with that question. When did you  
6 disclose it to Mark Daniel?

7 A. I did not disclose it to either attorney for  
8 Mark Porter. Robert told me that he disclosed it.

9 Q. When did Robert tell you that?

10 A. I don't recall the actual date.

11 Q. Well, was it before jury selection in the Paul  
12 Storey case?

13 A. Yes.

14 Q. So according to Robert, those two attorneys knew  
15 it before jury selection in the Paul Storey case?

16 A. That's my understanding.

17 Q. That the Cherrys were opposed?

18 A. That's my understanding.

19 The other thing I -- the reason why Robert  
20 was present for some of these meetings -- well, obviously,  
21 because he was the lead attorney and he was on the case  
22 from the beginning, which was 2006. Both cases were  
23 assigned to Criminal District Court Number Three, and that  
24 is where Robert was the chief. So anytime there was an  
25 appearance, Robert was there. I was the chief of the

1     213<sup>th</sup> District Court, so I was not present for court  
2     appearances nor did I interact with the attorneys when the  
3     case was set.

4           Q.     But you never disclosed it? You were just  
5     told --

6           A.     I did not.

7           Q.     -- by Robert that he did?

8           A.     That's correct.

9           Q.     Okay. Why do you think Robert told you that he  
10    disclosed it to Mark Daniel and Tim Moore?

11          A.     So that I would know.

12          Q.     Okay. I mean, it was important, wasn't it?  
13    It's something you would want to know?

14          A.     Yes.

15          Q.     Okay. Because it was important?

16          A.     I think he just wanted me to know that he had  
17    disclosed it to both sets of attorneys.

18          Q.     Well, it was important that he disclosed it,  
19    wasn't it?

20          A.     I think they needed to know.

21          Q.     So it wasn't important or it was important?

22          A.     I think it's important.

23          Q.     Okay. And did he tell you what Mark Daniel or  
24    Tim Moore's reaction was when they heard this?

25          A.     I think he said their reaction was that they

1 wanted him to waive the death penalty.

2 Q. Okay. So they discussed with him to waive the  
3 death penalty -- this is before the Paul Storey case,  
4 right, before the Paul Storey jury selection?

5 A. Yes.

6 Q. Okay.

7 A. Yes.

8 Q. That they discussed that when he disclosed this  
9 to them before Paul Storey's jury selection, whenever it  
10 was, that their reaction was, well, why don't you waive  
11 the death penalty?

12 A. Yes, that's my understanding, yes.

13 Q. Did -- I mean, that seems like a reasonable  
14 response, doesn't it?

15 A. Yes, it does.

16 Q. And did he tell you whether that was the Mark  
17 Daniel, Tim Moore, or both of them, that discussion?

18 A. I don't recall him telling me which one it was.

19 Q. Okay. Do you recall where you were when he told  
20 you?

21 A. Like where I physically was?

22 Q. Sure. I mean, did he send an email? Were you  
23 standing in the hallway?

24 A. Oh, he told me, he told me verbally.

25 Q. Do you know where you were when he told you

1 verbally?

2 A. Well, I would say my office or his office,  
3 somewhere in the district attorney's office.

4 Q. Okay. A safe assumption.

5 A. (Moving head up and down).

6 Q. But you don't specifically remember?

7 A. I don't.

8 Q. I mean, some things you specifically remember,  
9 you know, I remember it, I was, you know, so and so was  
10 there, I was standing there?

11 A. And that's true, there are certain  
12 conversations --

13 Q. But that one you don't?

14 A. I do not.

15 Q. And so what was Robert's -- what did Robert say  
16 his response was when -- when Mark Daniel or Tim Moore,  
17 whichever one it was, said, well, why don't you waive the  
18 death penalty? Did Robert tell you what his response was?

19 A. I think Robert suggested if that is the  
20 direction they wanted to go to approach Bob Gill and ask  
21 him about waiving the death penalty.

22 Q. Okay. Do you know if they did that?

23 A. I do not.

24 Q. Well, it would make sense if Robert told them  
25 that, that that's what they would do, they would approach

1 somebody about that, correct?

2 A. That would make sense.

3 Q. Does Bob Gill remember them approaching?

4 A. I don't know.

5 MR. BRAGG: Objection, Your Honor,  
6 speculation.

7 THE COURT: I'll sustain at this time.

8 Q. (BY MR. WARE) Have you talked to Bob Gill about  
9 this case?

10 A. I have not.

11 Q. I mean, have you communicated with him in any  
12 way about this case?

13 A. I don't think so.

14 Q. Well, I mean, have you or have you not?

15 A. I don't believe I have communicated with him. I  
16 see him frequently when we both have cases set in the same  
17 court. And the only reason I say I don't believe we have  
18 is because he might have said something to me in passing.  
19 But outside of that, no, there's not been any conversation  
20 about this case.

21 Q. So that's definitely something that it seems Tim  
22 Moore and Mark Daniel and maybe Bob Gill ought to remember  
23 is them approaching Bob Gill about waiving the death  
24 penalty?

25 MR. BRAGG: Objection, speculation, Your

1 Honor. She can't know what they are or aren't going to  
2 remember.

3 THE COURT: Well, I'm going to go ahead and  
4 allow that question at this time, if she knows.

5 THE WITNESS: Sure. I think your question  
6 originally was what was Robert's response and Robert  
7 suggested they go talk to Bob. Whether or not they ever  
8 did, I don't know.

9 Q. (BY MR. WARE) Do you know if they did anything?

10 A. I do not.

11 Q. I mean, did you ever -- you understood the  
12 Cherrys were against the death penalty. Did you ever sit  
13 down, you and the Cherrys and whoever else and just have a  
14 heart-to-heart talk about that and how that figured into  
15 this case?

16 A. I know that I had a lot of discussions with them  
17 once the trial began.

18 Q. But about that particular issue?

19 A. About their general opposition to the death  
20 penalty?

21 Q. Yeah, their general opposition or their specific  
22 opposition in this case.

23 A. I feel like I had a number of conversations with  
24 them during the trial. It has always been very important  
25 to me as a prosecutor for victims and their families to

1 understand what is happening, the legal process, the  
2 trial. What -- in other words, what has happened to bring  
3 us to a particular point, when a decision is made to seek  
4 the death penalty, all of the factors potentially that can  
5 go into that decision, that it is not an easy decision,  
6 that there are questions that a jury would have to answer.  
7 And they're thoughtful questions, and they're qualitative  
8 questions.

9 And so, yes, I sat down and explained that  
10 to them, and I wanted them to understand the opportunity  
11 that Paul Storey was given time and time again to accept a  
12 life sentence.

13 Q. So --

14 MR. WARE: I'm going to object to all that  
15 as unresponsive, Your Honor.

16 Q. (BY MR. WARE) Let me see if I can get you to  
17 answer my question.

18 Did you ever sit down with the Cherrys and  
19 have discussions or a conversation, however you want to  
20 put it, about their opposition to the death penalty, about  
21 that specifically?

22 A. I talked to them during the trial.

23 Q. About that specifically?

24 A. Yes.

25 Q. Okay. And -- and you also said that you told

1       them that Paul Storey was offered a life sentence?

2           A.     Yes.

3           Q.     When did you tell them that?

4           A.     I think they were told -- I think they were told  
5       in that same meeting, but I'm not positive, in that same  
6       meeting with Suman. But I'm not positive of that. But I  
7       know that I discussed it with them during the trial  
8       because I wanted them to understand every effort was made  
9       to give him the chance to take a life sentence.

10          Q.     So they should remember that?

11          A.     I don't know if they remember that or not.

12                   MR. WARE: Your Honor, could we take a  
13       break?

14                   THE COURT: All right. It's 10:30, so  
15       we've been proceeding for some length of time. Let's take  
16       a short recess at this time.

17                   (Recess)

18                   (Open court, defendant present)

19                   THE COURT: All right. Back on the record  
20       this morning. Are both sides ready to continue?

21                   MR. BRAGG: Yes, Your Honor.

22                   MR. WARE: Yes, Your Honor.

23                   THE COURT: Mr. Ware, do you have a few  
24       more questions to ask at this point?

25                   MR. WARE: Yes, sir.



1 Q. (BY MR. WARE) Did you ever talk to anybody in  
2 appellate about whether this should be disclosed or not?

3 A. I don't believe so.

4 MR. WARE: May I approach, Your Honor?

5 THE COURT: Very well.

6 Q. (BY MR. WARE) So part of the reason for  
7 disclosing this, and I think maybe even Bob Gill may have  
8 mentioned this in the conversation, is this is possibly  
9 Brady information in that it's mitigating, correct?

10 A. Actually, I don't think that there's any case  
11 that stands for the proposition that it is Brady  
12 information.

13 Q. Do you know of any case that stands for the  
14 proposition that it's not Brady information?

15 A. I think that a victim's or family members'  
16 wishes as to the ultimate fate of an individual actually  
17 are inadmissible in front of the jury.

18 Q. That's true under the Eighth Amendment and the  
19 Fourteenth Amendment, possibly, if their wishes are for  
20 the defendant to receive the death penalty, correct?

21 A. Well, the case --

22 Q. Is that correct?

23 A. Actually, I don't think that's correct.

24 Q. Okay. But when the case is the opposite where  
25 the State is seeking the death penalty and the victim's

1 parents do not want the jury to give the death penalty,  
2 Payne versus Tennessee, those cases do not address that  
3 situation, do they?

4 A. That is correct.

5 Q. Okay. But they absolutely do address the  
6 situation where the victim's parents do want the death  
7 penalty for the defendant, correct?

8 A. That was the factual scenario in that case.

9 Q. Okay. And in other cases that have come since  
10 then?

11 A. That's correct.

12 Q. I mean, that's well known that if the victim's  
13 parents want the death penalty, the Eighth Amendment, the  
14 Fourteenth Amendment says the prosecutor, the State cannot  
15 put them on to testify to that, correct?

16 A. Well, I actually think that --

17 Q. I mean, correct or not correct?

18 A. Well, the case law -- the law --

19 Q. So that's not correct? It's a simple question,  
20 correct or not correct?

21 A. The law says, the cases say that a --

22 MR. WARE: I object as nonresponsive.

23 THE COURT: Well, answer the best you can,  
24 and then there will be a chance for cross-examination, I  
25 suppose.

1                   THE WITNESS: All right. Would you please  
2 restate your question?

3           Q.    (BY MR. WARE) There's no question that the cases  
4 say that it is a violation of the Eighth and maybe the  
5 Fourteenth Amendment, such as in Payne versus Tennessee,  
6 cases that have come since then, to put the family on to  
7 say they want the jury to impose the death penalty; is  
8 that correct?

9           A.    That's correct.

10          Q.    Thank you.

11                   I'm going to hand you what has been marked  
12 as Defendant's Exhibit Number 1, which I can represent to  
13 you was filed in this case by Larry Moore at trial. Does  
14 that look familiar to you?

15          A.    It does.

16          Q.    What is that?

17          A.    It is the Defense's Motion to Produce  
18 Inconsistent or Mitigating Evidence.

19          Q.    Okay. And what's the date of that filing  
20 file-marked?

21          A.    It appears to be May 10<sup>th</sup> of -- looks like  
22 2007.

23          Q.    Okay. So May the 10<sup>th</sup>, 2007 that motion is  
24 filed, correct?

25          A.    It appears to be, yes.

1 Q. Okay. Do you remember the hearing where that  
2 motion was heard?

3 A. There was one hearing that I was not present  
4 for.

5 Q. Okay.

6 A. And this -- that may or may not have been that  
7 hearing.

8 Q. Well, I can represent to you the court  
9 reporter's notes indicate you were present for the  
10 hearing.

11 A. Okay.

12 Q. Which was February the 8<sup>th</sup> of 2008?

13 A. Okay.

14 Q. Does that make sense?

15 A. Sure.

16 Q. You were on board at that point?

17 A. Yes.

18 Q. And --

19 A. And when I say there was a hearing that I  
20 missed, the hearing would have been probably sometime  
21 around the summer.

22 Q. Of 2008?

23 A. Yes.

24 Q. Okay. Well, this was in February.

25 A. I don't doubt you, Mike.

1           Q.     And can you look on the page behind that. And  
2     the page behind that, I believe. And that is the actual  
3     order granting that motion; is that correct?

4           A.     Yes.

5           Q.     Which is likewise dated?

6           A.     February 8<sup>th</sup>, 2008.

7           Q.     Okay. And what does that hearing -- what does  
8     that motion -- what does it request?

9           A.     All information that would be inconsistent or  
10    mitigating.

11          Q.     Okay. And it really goes beyond, doesn't it?  
12    Tell me if I'm reading this correctly.

13                   The defendant would further respectfully  
14    request that the Court instruct the prosecution to produce  
15    any and all such evidence inconsistent with the  
16    defendant's guilt, impeachment evidence, mitigating  
17    evidence, or any other evidence that would be material --  
18    of material importance to the Defense even though it may  
19    not be offered as testimony or exhibits by the prosecution  
20    at the trial of this case on the merits.

21                   Do you agree or disagree with me that the  
22    fact that the Cherrys, the parents of the victim in this  
23    case where you were seeking the death penalty were opposed  
24    to the death penalty, you agree that that information  
25    would fit within this motion's request?

1           A.     I agree.

2           Q.     Okay.  And the judge granted that, correct?

3           A.     Yes.

4           Q.     Okay.  State's Exhibit Number 2 is just the  
5 hearing on February the 8<sup>th</sup> where the judge grants the  
6 motion?

7           A.     Mike, I don't doubt you.  I agree.

8           Q.     Well, this is the first time you and I have  
9 talked about this, right?

10          A.     No, it's actually not.

11          Q.     About this?

12          A.     About this case.

13          Q.     So when y'all disclosed the fact that the  
14 Cherrys were against the death penalty, it was -- I mean,  
15 you chose to do it, but in fact you were court ordered to  
16 do just that, correct?  Not specifically, but it fit  
17 within the category of evidence that the Court ordered you  
18 to disclose.

19          A.     I think so in the broadest sense, yes.

20          Q.     Let me show you State's -- Defendant's Exhibit  
21 Number 3 and ask you if you can identify what that is?

22          A.     It's the State's First Amended Notice of Brady  
23 Material.

24          Q.     Okay.  And this is filed with the court, right,  
25 or filed with the clerk?

1 A. Yes.

2 Q. And it's in writing?

3 A. It is.

4 Q. And this was filed July the 10<sup>th</sup> of 2008,  
5 correct?

6 A. Correct.

7 Q. And what is the purpose of this file -- it was  
8 actually signed by Robert Foran; is that correct?

9 A. That's right.

10 Q. But you were on the case by then, obviously.  
11 This was actually just prior to jury selection, I think.  
12 I mean, you were involved in the case.

13 A. I was involved in the case, and it was prior --  
14 it was filed prior to jury selection.

15 Q. Okay. And did you and him talk about what to  
16 put on here?

17 A. No -- well, we might have. I mean, let me look  
18 and see.

19 Yes, we did.

20 Q. You did?

21 A. We did.

22 Q. Did you make a decision not to include the fact  
23 that the Cherrys were against the death penalty? Did you  
24 make a decision not to include that on here?

25 A. No, we did not.

1 Q. You didn't make a decision one way or the other?

2 A. No.

3 Q. You didn't discuss it?

4 A. No, we didn't.

5 Q. But you agree that it's not on here?

6 A. I'd agree.

7 MR. WARE: Your Honor, we'd offer -- and  
8 these are all part of -- actually the clerk's file. But  
9 we'd offer Exhibits 1, 2, and 3 as part of this hearing.

10 MR. BRAGG: Your Honor, I would just ask if  
11 it's possible, or to the best of opposing counsel's  
12 ability, to offer just for clarity sake where -- I mean, I  
13 have no doubt that they are a part of the record. Just  
14 the CCA already has this record before it, it might help  
15 them when they review this case to have a record cite to  
16 go with it; for example, page so and so of the clerk's  
17 record from the trial or part of the Reporter's Record or  
18 whatever it might be.

19 MR. WARE: We can certainly do that.

20 THE COURT: All right. But you have no  
21 objection, you'd just like it to be clarified where it is?

22 MR. BRAGG: I'm just making sure that this  
23 is what he represents it to be, which I'm sure it is.

24 MR. WARE: If I can do that later, Your  
25 Honor.



1 MR. BRAGG: No objection.

2 THE COURT: I'll permit counsel to clarify  
3 where it is in the record. Looks like some page numbers  
4 on some of those, anyway. These are actually marked  
5 Defense Exhibits 1, 2, and 3. Those are actually  
6 Applicant's exhibits.

7 MR. WARE: Well --

8 THE COURT: But one, two, and three are  
9 admitted.

10 MR. WARE: Habits are hard to break, Your  
11 Honor.

12 THE COURT: I think we're all clear what  
13 they are and who is offering them. So one, two, and three  
14 are admitted for purposes of this hearing.

15 MR. WARE: Thank you, Your Honor.

16 Q. (BY MR. WARE) Is it -- is it your position, or  
17 do you have one, that Larry Moore and Bill Ray were told  
18 about the Cherrys' opposition to the death penalty before  
19 you filed or before Robert filed what's now Exhibit Number  
20 3 which is a list of Brady disclosures, or were they told  
21 after that list was filed? And this list was filed, I  
22 believe, on July the 8<sup>th</sup>, 2008.

23 A. What I can tell you is that Robert told me on a  
24 number of occasions that he and Bill had discussed the  
25 Cherrys' position. I can tell --

1           Q.     The position against the death penalty, just to  
2     be clear.

3           A.     That is correct. I can tell you that --

4           Q.     And that would have been before that was filed?

5           A.     Yes.

6           Q.     Okay.

7           A.     I can tell you that there were discussions  
8     during jury selection, whether it be on a break, whether  
9     it be in between veniremen that were had that also  
10    referenced or incorporated the Cherrys' opposition to the  
11    death penalty. Was Larry Moore present in the room when  
12    that occurred? I don't know. Were Larry and Bill present  
13    in the room together when that occurred? I can't tell  
14    you.

15          Q.     Who can tell us?

16          A.     Well, all I can tell you is that the  
17    conversations were had.

18          Q.     Now, so they were aware that the Cherrys were  
19    against the death penalty?

20          A.     Yes.

21          Q.     There's no doubt in your mind about that?

22          A.     That is correct.

23          Q.     And that would have been before trial ever began  
24    they were aware that the Cherrys were against the death  
25    penalty?

1           A.     That is my understanding, yes.

2           Q.     Okay.  And y'all had discussions about it with  
3     a -- each other and with Bob Gill, maybe other people, and  
4     y'all decided that was the thing to do, disclose that  
5     information?

6           A.     Yes.

7           Q.     And not only that, the judge, Elizabeth Berry  
8     ordered y'all to disclose such information in the motion  
9     and the order that are now one, two, and three, correct?

10          A.     That is correct.

11          Q.     So whether the law required it or not, in this  
12     particular case the judge was requiring it, correct?

13          A.     Yes, in the broadest sense, yes.

14          Q.     Okay.  Now, is -- is it your position that at  
15     some point the Cherrys changed their position?

16          A.     I think --

17          Q.     I mean, did they?  Because there was no question  
18     they were adamantly against it at first.  Did they change  
19     their position?

20          A.     I think their position did change, yes.

21          Q.     Okay.  And how did they -- did they communicate  
22     that to you?

23          A.     They did.

24          Q.     How did they communicate it to you?

25          A.     Well, throughout the trial, they participated in

1 the trial. And when I say --

2 Q. Okay. Go ahead.

3 A. They sat behind us in the trial. They did not  
4 have to appear for the trial. They did not have to  
5 participate in, to watch, to witness this trial. And they  
6 were there from the beginning all the way through the end.  
7 And we talked to them after each of the witnesses.

8 I think there were two witnesses, maybe,  
9 that they did not sit in on, and that would have been the  
10 medical examiner and that would have been the crime scene.  
11 I don't believe they sat in for those two witnesses. But  
12 outside of those two witnesses, they were there, they saw  
13 this case through.

14 Q. Sure.

15 A. And there were conversations that were had many  
16 times throughout the trial with the Cherrys.

17 Q. So they sat behind y'all's table, is that what  
18 you're saying, in the audience?

19 A. I have to think where the jury box is. All  
20 right. The jury box would be on my right in CDC 3, so our  
21 table would have been immediately there. They would have  
22 sat against the wall, as I recall. So really more  
23 directly behind the jury box or to the side of the jury  
24 box.

25 Q. Okay. And chances are, the jury knew exactly

1       who they were, at least by the end of the trial, correct?

2           A.       Well, I think that Suman identified them during  
3       her testimony.

4           Q.       They probably even knew before Suman identified  
5       them that those were the victim's parents. I mean, that's  
6       part of the reason of having them sit behind y'all so the  
7       jury knows who they are; isn't that correct?

8           A.       I don't know that they would have known that  
9       they were family until Suman identified them.

10          Q.       Okay. Well, they were there for -- how long was  
11       the trial?

12          A.       The trial was -- the trial began on  
13       September the 2<sup>nd</sup> of 2008 and it concluded it looks like  
14       on September the 12<sup>th</sup> of 2008.

15          Q.       So over those ten or so days, the jury probably  
16       figured out who these -- who this nice couple was sitting  
17       behind the prosecutors' table, correct?

18          A.       I think they certainly knew when Suman  
19       identified them.

20          Q.       If they hadn't figured it out before, they knew  
21       when Suman identified them?

22          A.       Yes. And I think there were other people, I  
23       don't think they were the only ones who sat in through the  
24       trial.

25          Q.       Of course, y'all wanted the jury to know who

1       they were, didn't you?

2           A.     Yes.

3           Q.     Okay.  So Suman did testify --

4           A.     She did.

5           Q.     -- correct?

6                         She did not testify that she wanted the  
7       death penalty, did she?

8           A.     That's correct.

9           Q.     And in fact, as we discussed earlier, the  
10       Constitution would prohibit her from testifying that she  
11       wanted the death penalty; isn't that correct.  Is that  
12       your understanding of the law?

13          A.     I think initially.  But I think if -- I think  
14       there's an argument to be made that it could have been  
15       invited by the Defense mitigation case.  And in that  
16       instance it might have allowed her to testify that she, in  
17       fact, was in favor of the death penalty.

18          Q.     So -- so after the Defense mitigation case, did  
19       y'all move to reopen and put her on to testify that she  
20       was in favor of the death penalty?

21          A.     We did not.

22          Q.     Is it your position that you could have?

23          A.     I think there is an argument to be made that we  
24       could have.  However, in each of the death penalty cases  
25       that I have been involved in, I've never done that.

1 Q. And you didn't do it in this case?

2 A. I did not.

3 Q. In fact, you didn't do it because it's probably  
4 a sure way for a reversal; isn't that correct?

5 A. I think there's an argument that it would have  
6 invited. I'm not going to say that it would be a  
7 sure-fire way for a reversal. I don't agree with that.

8 Q. It's pretty clear law, isn't it?

9 A. I think that if there's no mitigation case, I  
10 think you're correct. I think if the Defense puts on  
11 cases where they're asking for someone's life to be spared  
12 or they're suggesting that a life sentence is more  
13 appropriate than the death penalty, I think the State  
14 would be entitled to respond appropriately.

15 Q. That's just -- did you consult with appellate  
16 about that?

17 A. I did not.

18 Q. Okay. So in fact, the -- and Suman, she got on  
19 the stand and she pointed out, as you say, she pointed out  
20 Jonas Cherry's parents, correct?

21 A. She did.

22 Q. So now the jury knows who those -- who that nice  
23 couple is that's been sitting there throughout almost the  
24 complete trial, correct?

25 A. That's correct.

1 Q. Pretty close to the jury box, really?

2 A. I think they were three or four rows back, but  
3 it might have been two rows back. They were not on the  
4 front row, I remember that. And I think there were people  
5 seated in front of them, and I think there were people  
6 seated behind them as well.

7 Q. Throughout the trial?

8 A. I think so.

9 Q. But they were consistently there, probably the  
10 people sitting in front of them and people sitting behind  
11 them may have come and gone?

12 A. I think there was a pretty consistent group.

13 Q. Uh-huh. Okay. And the Cherrys were part of  
14 that consistent group?

15 A. That's true.

16 Q. Okay. So the Defense did, in fact, put on  
17 witnesses that asked the jurors to spare Paul Storey's  
18 life, correct?

19 A. That's correct.

20 Q. And at one point either you or Robert -- I think  
21 the first witness either you or Robert objected. Do you  
22 remember that?

23 A. That was Robert.

24 Q. Okay. Robert objected?

25 A. Uh-huh.



1 Q. The judge overruled his objection, correct?

2 A. I think actually the first time she sustained it  
3 and then subsequently she overruled it.

4 Q. Okay. So the judge was saying, I think it comes  
5 in, correct? I mean, she was put to the test. There was  
6 an objection made and she overruled it and she allowed it,  
7 correct?

8 A. That's correct.

9 Q. And then there were several witnesses after that  
10 where neither you or Robert even objected, correct?

11 A. Actually, I think Robert continued to object.

12 Q. Well, you wouldn't argue with me if I told you  
13 that was not correct?

14 A. Well, I looked at the testimony last night, and  
15 I seem to remember that he did object a number of times.

16 Q. Okay.

17 A. Now, he was consistently overruled after that  
18 first objection was sustained, but I think he did continue  
19 to object, but --

20 MR. WARE: May I approach, Judge?

21 THE COURT: Very well.

22 MR. WARE: I'm probably not going to offer  
23 this. I'm just going to refresh her memory with it, but  
24 I'll go ahead and have it marked.

25 Q. (BY MR. WARE) I'm going to show you what's been

1 marked as Defendant's Exhibit Number 4. And let's start  
2 with -- this is Volume 38 of the transcript, page 166.  
3 I'm not completely sure which witness this is, but it's a  
4 defense witness. And I think Bill Ray is questioning this  
5 witness. And he says --

6 A. Would you like me to hold it?

7 Q. I got it. He says -- this is going into the  
8 testimony. You tell me if I'm reading this correctly.

9 You know what the facts are in this case?

10 No, sir, not exactly.

11 And I explained to you basically what the  
12 case was about, did I not?

13 Oh, yes, sir, you did that.

14 And you know the jury is either going to  
15 sentence him to die by lethal injection or he's going to  
16 go to the penitentiary for the rest of his life?

17 Yes, sir. I would hope not, though.

18 You understand there's only two options.  
19 It's either life in the penitentiary --

20 Yes, I understand that.

21 -- with no chance of parole, or he goes  
22 executed -- or he gets executed?

23 Right.

24 Says: I'll pass the witness.

25 Okay. There's no objection to any of that.

1           A.     Well, that's because he didn't ask the question.  
2     And that was Paul Storey's father that testified.

3           Q.     So here we are again, another defense witness.

4                     Are you asking the jury to consider those  
5     things that you've told them in making the decisions as to  
6     what will happen to Paul?

7                     Yes, I am.

8                     Are you asking the jury to spare Paul's  
9     life?

10          A.     And Mr. Foran objects.

11          Q.     And the Court overruled?

12          A.     Right.

13          Q.     Okay.   So those are -- those are two.   And then  
14     we go -- here's another witness.

15                     Do you think if the jury chooses to spare  
16     Paul Storey's life that he can still be off some help and  
17     good to you?

18                     I know he will be, sir.

19                     He can still be a force for good in your  
20     life, in the life of your mother and the people that care  
21     about him; is that right?

22                     Yes, sir.

23                     Are you asking the jury to give him that  
24     opportunity?

25                     Yes, sir.

1                   Do you think there's good things about your  
2 brother?

3                   I know there's good things about my  
4 brother.

5                   Despite everything that he may have done  
6 and everything he has brought him here to the place that  
7 he sits in front of you, do you think he is worth saving?

8                   Yes, sir.

9                   Thank you. Pass the witness.

10                  No objection?

11                 A. I think if you look above that, on a number of  
12 other witnesses Robert lodged objections.

13                 Q. But I'm saying some of it came in without  
14 objection?

15                 A. That is correct.

16                 Q. Without going through the tedium of all the --  
17 of all the testimony, I can represent to you, and we can  
18 prove this up later, that Robert objected twice, the first  
19 time it was sustained, the second time it wasn't, and that  
20 he didn't object after that for several more witnesses  
21 that testified to that. Okay?

22                 A. I think he objected more --

23                         MR. BRAGG: Objection, Your Honor. Is that  
24 a question? It sounded more like a statement.

25                         MR. WARE: Okay.

1                   THE COURT: Are you putting it in the  
2 form --

3                   MR. BRAGG: I mean, that's something that  
4 come to the findings of fact later on.

5                   MR. HAMPTON: Judge, I've got a solution to  
6 move things along. You've got the record. We can point  
7 it out to you, and I'll offer to do it.

8                   THE COURT: All right. I agree that  
9 counsel certainly will have the ability to point things  
10 out.

11                  MR. WARE: Absolutely. Thank you, Your  
12 Honor.

13                  Q. (BY MR. WARE) So is it your position that --  
14 that -- well, let me ask you, whether he objected or  
15 didn't object, that came in either over his objection or  
16 without his objection, correct?

17                  A. I would agree with you.

18                  Q. So either the judge disagreed that it was  
19 objectionable and/or at some point you and Robert, at  
20 least for some of the witnesses, agreed that it was not  
21 objectionable and didn't even bother to object to that  
22 testimony?

23                  A. I don't know that we agreed it wasn't  
24 objectionable. I think she sustained a number of -- I'm  
25 sorry. She had overruled a number of Robert's objections.

1           Q.     Well, we can clear that up later, whether it was  
2     once or whether it was a number of them.   Okay.

3                     In any event, it came in.   And did y'all --  
4     I think you've already answered, y'all did not move to  
5     reopen at that point and say, well, Judge, if you're going  
6     to let that in, we want to put it in that the Cherrys are  
7     for the death penalty -- that Jonas Cherry's family and  
8     everyone who loves him are for the death penalty.   Did you  
9     ever make that presentation to the judge or make that  
10    argument to the judge?

11          A.     No, I didn't.

12          Q.     And you knew the judge was not going to let that  
13    in, didn't you?

14          A.     No, I didn't know that.

15          Q.     All right.   So is it your position, I guess,  
16    from what you told the newspaper, that at some point the  
17    Cherrys made it clear that they had changed their position  
18    on the death penalty?

19          A.     Yes.

20          Q.     Okay.   And how is it that they -- did they  
21    communicate that to you?

22          A.     Yes.

23          Q.     Okay.   When did they communicate that to you?

24          A.     Well, there is one specific conversation.   But  
25    before that conversation, as I interacted with them

1 through each of the witnesses -- for instance, when we  
2 began with Larry Fitzgerald who testified and was the very  
3 first Defense witness, after he concluded his remarks or  
4 after he concluded his testimony and he discussed the fact  
5 that the Texas Seven were able to escape from Huntsville  
6 when they were in general population, that a man had  
7 escaped from TDC while we were in trial who was housed in  
8 general population, I had a discussion with them after  
9 Larry Fitzgerald's testimony and they remarked, was he a  
10 Defense witness or a State's witness, because it was so  
11 very clear that they did not want Paul Storey to be in  
12 general population and ever have the ability to escape or  
13 to hurt anyone else.

14 MR. WARE: Okay. I'm going to object to  
15 all that as nonresponsive, see if I can get you to answer  
16 my question.

17 Q. (BY MR. WARE) When did they and how did they  
18 communicate to you that they had changed their very strong  
19 feelings against the death penalty to the point where they  
20 believed the death penalty was appropriate in this case?

21 A. Okay. Outside of the conversations that we had  
22 with other -- I mean, after and before other witnesses,  
23 there was a point during the punishment phase, and I  
24 believe it was after Ms. Shankle testified, and that's  
25 Paul Storey's mother, that Glenn approached me. And I was

1     either at the railing or the other side of the railing, so  
2     I was either this side of the railing or the other side of  
3     the railing.

4                     And Glenn approached me. And I -- as I  
5     recall, it was after Marilyn Shankle's testimony because  
6     her testimony was very emotional, it was very compelling.  
7     And Glenn approached me. And I think there was some  
8     conversation with Robert that I could not hear. But then  
9     the part that I heard was where he said, and he said it --  
10    and he either said, do you want me to or should I tell the  
11    jury that we want the death penalty?

12            Q.     So you heard that part of the conversation?

13            A.     Yes.

14            Q.     Did you -- did you sort of do a double take and  
15    go, what? All this time they've been against the death  
16    penalty? Did I hear what I just think I heard? Did you  
17    take a double take like that?

18            A.     No, I didn't take a double take like that,  
19    because I had also watched their reaction to all of the  
20    evidence in the guilt-innocence phase and the punishment  
21    phase.

22            Q.     So you're saying it's at that point you knew  
23    that they had changed their position on the death penalty  
24    based on what you say you heard of this conversation that  
25    you were not actually a direct part of?



1           A.     No. He was talking, and I think Robert was -- I  
2     can't remember if Robert was to my right or my left, and  
3     so he was talking to both of us. And what --

4           Q.     Tell me the whole conversation then. Let's  
5     start at the beginning.

6           A.     Well, there was a part of it I could not hear.  
7     And then what I heard him say --

8           Q.     Well, what part -- start from the beginning. So  
9     what brought y'all together? You said this was after Paul  
10    Storey's mother testified?

11          A.     As I recall, the timing of it was after Marilyn  
12    Shankle's testimony.

13          Q.     And before the next witness?

14          A.     Well, she was actually the last punishment  
15    witness for the Defense.

16          Q.     Okay.

17          A.     Okay. And as I recall --

18          Q.     But before argument?

19          A.     Yes.

20          Q.     Okay.

21          A.     Okay. As I recall, she had testified. And  
22    there was a break. The jury had been taken back to the  
23    jury room. And I believe that is when the Defense was  
24    talking to Paul Storey about whether or not he was going  
25    to testify. Okay. So it's somewhere in all of that. The

1 jury was outside of the room, and Glenn Cherry approached  
2 the rail and had that conversation.

3 Q. And that's the first you had heard that they had  
4 changed their mind about the death penalty?

5 A. You know, I don't know that -- well --

6 Q. That's the first you remember?

7 A. That's -- that is the first time I recall them  
8 putting it that succinctly, yes.

9 Q. Okay. And what exactly did -- relate the whole  
10 conversation.

11 A. All I can relate to you is him coming up,  
12 there's some conversation that I could not hear.

13 Q. That's between him and Robert?

14 A. Well, I was standing there, I just couldn't hear  
15 it very well.

16 Q. Well, who could hear it?

17 A. Well, I presume Robert could hear it.

18 Q. Okay. So's that's the conversation between him  
19 and Robert or -- or you, whatever?

20 A. Right.

21 Q. Was there anybody else?

22 A. Well --

23 Q. Was Judith Cherry there?

24 A. She was behind him. I don't know how close  
25 behind him she was. But I believe she was to his left --

1 no, his right, my left. I don't know that she was close  
2 enough to hear. I don't know that she wasn't close enough  
3 to hear.

4 Q. Was there anybody close enough to hear?

5 A. There were people, because there was a group of  
6 people over there. I don't know that there was anyone  
7 else that was a part of this conversation.

8 Q. So there's a lot of people there, but the only  
9 people that are part of the conversation and for sure  
10 could hear are you and Robert and Glenn Cherry?

11 A. That's correct.

12 Q. Okay.

13 A. And I don't know if our investigator --

14 Q. Even you didn't hear the whole conversation?

15 A. That's true. I don't know if our -- I don't  
16 know how close my investigator was to us. I don't know if  
17 he could hear it. He probably couldn't because he doesn't  
18 have very good hearing.

19 Q. Okay. So of what you could hear, just tell us  
20 what happened. Tell us, you know, what was going on that  
21 you couldn't hear. Tell us what you could hear. Tell us  
22 exactly what you did perceive.

23 A. That he asked me if he should --

24 Q. He asked you?

25 A. I was looking right at him and heard this. I

1 don't know if I wasn't looking at him for the first part  
2 and didn't hear that. But I was looking right at him and  
3 he said, should I testify or do you want me to testify?

4 Q. Okay. So, of course, at that point y'all had  
5 already put on your case, did you not?

6 A. Yes.

7 Q. So what even brought up him -- y'all had already  
8 decided that Mr. -- or Mr. Cherry, Glenn, and Dr. Cherry,  
9 Judith, were not going to testify, had you not? I mean,  
10 you'd put on your case and hadn't called them?

11 A. Well, that's true. But, I mean, in theory they  
12 always could have you been called in rebuttal. I have put  
13 witnesses on in rebuttal in a death penalty case.

14 Q. Why did you decide for them not to testify in  
15 the first part?

16 A. You know, the trial was difficult for them.

17 Q. I'm sorry?

18 A. The trial was difficult for them. They did  
19 not --

20 Q. Okay.

21 A. They really did not know the details of their  
22 son's execution. We really had not shared really the  
23 callous way his life was taken, and it was difficult. He  
24 was their only child.

25 Q. So is it your position or your testimony here

1       today that the fact that they were against the death  
2       penalty had nothing to do with them not testifying at the  
3       first part of the punishment stage?

4           A.     No, I'm not going to say that had nothing to do  
5       with it.

6           Q.     So it did have something to do with it?

7           A.     It did have something to do with it.

8           Q.     Okay. And so y'all finished your part of the  
9       case and -- and -- and at that point they're against the  
10      death penalty, because that had something to do with you  
11      not calling them as witnesses, correct?

12          A.     Well, I don't think it's as clear as you're  
13      making it.

14          Q.     Okay.

15          A.     I mean, as we're going through the trial, they  
16      are reacting and they're learning all of this information  
17      that they really did not know beforehand.

18          Q.     Well, they were all for Paul Storey being  
19      prosecuted. I mean, they were all cooperative and all for  
20      him being prosecuted, were they not?

21          A.     Uh-huh. That is correct.

22          Q.     I mean, they were devastated by the death of  
23      their son.

24          A.     Absolutely. Absolutely.

25          Q.     They were just against the death penalty. They

1       were for life without the possibility of parole.

2           A.       I think that as the punishment phase progressed,  
3       I think their views changed.

4           Q.       Okay. But they didn't change so much that you  
5       decided -- you changed your mind and decided to put them  
6       on as witnesses?

7           A.       That's correct.

8           Q.       Okay. So we're back to this conversation with  
9       Mr. Cherry, Glenn. And I think what you say you heard  
10      was, well, do you want me to testify or not testify?

11          A.       No. What he said was -- and I'm sorry, I didn't  
12      finish my sentence a few moments ago when you asked me to  
13      repeat it a second time. What he said was, do you want me  
14      to or should I testify that we want the death penalty, and  
15      I said that's not necessary.

16          Q.       Well, what came before that? I mean, did he  
17      just blurt that out of the blue or what came before that?

18          A.       No. From time to time --

19          Q.       I mean, context is everything, right?

20                   THE COURT: One at a time.

21                   THE WITNESS: Well, there was some  
22      conversation that I could not hear. I did not hear.  
23      Okay. So when you ask me what came before that, I can't  
24      answer that. What happened in the trial before that, as I  
25      recall the timing of this was after Marilyn Shankle's

1 testimony.

2 Q. (BY MR. WARE) Okay.

3 A. Okay.

4 Q. So you're testifying here under oath that you  
5 heard Glenn Cherry say, so do you want me to testify that  
6 I'm for the death penalty?

7 A. Should I or do you want me to.

8 Q. Testify that I'm for the death penalty?

9 A. That we want the death penalty, yes.

10 Q. Okay. And what was your response?

11 A. That's not necessary.

12 Q. Okay. And only you and Robert and Glenn Cherry  
13 heard all that, that you know of?

14 A. That I know of, yes.

15 Q. And then what happened after that, you said,  
16 that's not necessary?

17 A. I think after that, I don't know if Paul Storey  
18 had made his decision or not to testify or they put that  
19 on the record. I don't know whether or not that  
20 conversation --

21 Q. But I mean the conversation between y'all.

22 A. I guess I'm not understanding your question.

23 Q. Well, I mean, from what I understand, you know,  
24 there's kind of a break, Robert's talking to Mr. Cherry,  
25 and you walk up and all you hear is, so -- and I'm

1 paraphrasing, this may not be a quote, so do you want me  
2 to come up and testify that I'm for the death penalty, and  
3 then you say, no, that's not necessary, and that's the end  
4 of it all. Can you put it in any better context than  
5 that?

6 A. Well, from time to time when there would be a  
7 break, it would be like -- it would be like we would turn  
8 around and the Cherrys would approach us, or we would  
9 approach the Cherrys during the trial when we were on  
10 break to talk about the witness, to talk about the  
11 cross-examination.

12 And Glenn approached us. I can't say  
13 whether I was standing on this side of the rail or that  
14 side of the railing, but the conversation took place in  
15 that little walkway. All right. And I was standing  
16 there. I didn't just walk up, I was standing there with  
17 Robert. I just couldn't hear what was said right before  
18 that. And then Glenn made that comment, and I said,  
19 that's not necessary.

20 Q. That's all there was to it that you remember?

21 A. Yes.

22 Q. Did you make a note -- I mean, did you think,  
23 wow, you know, that's a change?

24 A. I was surprised, but I wasn't shocked in light  
25 of the fact that I had watched them respond and react to



1 the evidence that they had heard for ten-plus days.

2 Q. Did you ask him to explain or to elaborate on  
3 what he was talking about?

4 A. No, I did not.

5 Q. You heard that, you say, and it was like, well,  
6 guess he's changed his mind, I guess he's for the death  
7 penalty now. Is that what you're saying?

8 A. I felt like in listening to his question, with  
9 him saying that, that he believed that Storey deserved the  
10 death sentence in light of everything that he had heard.

11 Q. But you didn't ask him to elaborate or confirm,  
12 that's just the conclusion you draw from what you say you  
13 heard him say?

14 A. That's correct.

15 Q. So is that when you decided to argue like you  
16 did, when you heard that?

17 A. That is one of the things, yes. Because  
18 overnight, I wrestled with whether or not I should put him  
19 on the stand.

20 Q. Did you talk to him about that? Did he know you  
21 were wrestling about whether to put him on the stand?

22 A. No, he did not.

23 Q. So he would have no clue. If you put him on the  
24 stand the next day, it would have been cold because you  
25 never talked to him about possibly putting him on the

1 stand after that?

2 A. Well, I think we both rested and closed that  
3 day.

4 Q. Okay. So there really wasn't an opportunity to  
5 put him on the stand the next day?

6 A. Well, I could have put him on the stand that  
7 afternoon.

8 Q. Okay.

9 A. After he said that.

10 Q. But you didn't?

11 A. But I did not.

12 Q. And in fact, if what you say is true, even if  
13 what you say is true, then very likely that would not have  
14 been admissible, correct? I mean, if the Defense had  
15 objected, you know, like under a whole line of Supreme  
16 Court cases that that is impermissible to give victim  
17 impact testimony, the judge would either sustain the  
18 objection or there very likely could have been a reversal,  
19 correct?

20 A. I don't know that I would agree with you, Mike.

21 Q. But that's a very serious issue?

22 A. It is a serious issue.

23 Q. It's a very clear-cut issue at the Supreme  
24 Court?

25 A. I think -- I'm sorry, I didn't mean to interrupt

1     you.

2           Q.     I'm done.

3           A.     In the absence of a mitigation case, I think it  
4 absolutely would be reversible error. I don't think it's  
5 admissible.

6                     In light of the case that they put on and  
7 generally what is put on in the cases that I was involved  
8 in, I think there is an argument, though I've never done  
9 it.

10          Q.     But, you know, in this case we'll never know  
11 because you didn't put him on?

12          A.     That's correct.

13          Q.     So did you and Robert discuss this part of the  
14 argument that you made before you made it?

15          A.     No.

16          Q.     Did you discuss it with anybody before you made  
17 it?

18          A.     No.

19          Q.     Did you discuss it after you made it?

20          A.     After I made the argument?

21          Q.     Yeah, did you discuss it with Robert or anyone  
22 else?

23          A.     No.

24          Q.     Did he ever say anything to you about it?

25          A.     No.

1 Q. And you know what argument I'm talking about?

2 A. I do.

3 Q. Okay. The argument, and I think I'm pretty much  
4 quoting it, where you say, and I think it goes without  
5 saying that Jonas Cherry's family and everyone who loved  
6 him believes the death penalty is appropriate, correct?

7 A. Well, I think it's, and it should go without  
8 saying, but the gist is the same.

9 Q. And it should go without saying?

10 A. Right.

11 Q. Now, you'll agree with me that even if  
12 everything you're saying is true and even if all the  
13 inferences you took from that brief conversation that you  
14 say you had are accurate, that at the very least that  
15 argument was outside the record. There was no record of  
16 Suman testifying that she was in favor of the death  
17 penalty or thought it was appropriate. There was no  
18 record of Suman saying anybody else in the family believed  
19 the death penalty was appropriate or that anyone or that  
20 everyone who loved Jonas Cherry believed the death penalty  
21 was appropriate. There was no testimony that supported  
22 that argument, so it was outside the record. You agree  
23 with at least that much?

24 A. I believe it was outside the record, but I also  
25 think that it is argument --

1 Q. Well --

2 A. -- and you're allowed to respond --

3 Q. -- argument has rules, does it not?

4 A. It does.

5 Q. And as a prosecutor, as a spokesman for the  
6 State of Texas, the person in authority, you have certain  
7 rules you've got to go by even in argument, correct?

8 A. That is correct.

9 Q. Maybe especially in argument, correct?

10 A. I think there are rules that control closing  
11 arguments.

12 Q. Okay. And it's very important that there be  
13 rules in closing argument, correct?

14 A. That is correct.

15 Q. Okay. And one of the rules is neither side can  
16 argue outside of the record, correct?

17 A. That's correct.

18 Q. And so --

19 A. Well, I take that back.

20 Q. So --

21 A. Unless you're responding to something.

22 Q. So at the very least -- well, of course, at this  
23 point the other side hadn't even argued, had they?

24 A. That's right.

25 Q. Because you were the first one to argue?

1           A.     But I think you're allowed to respond to  
2 evidence that's elicited by --

3           Q.     You were the first -- you were the first one to  
4 argue, correct?

5           A.     I was the first one to argue, yes.

6           Q.     So certainly there was no argument that you were  
7 responding to because there was -- there had been no  
8 argument to respond to, correct?

9           A.     I think you're allowed to respond to --

10          Q.     Let's me see if I can get you to answer my  
11 question. There had been no argument by the Defense at  
12 that point, correct?

13          A.     I was the first attorney to argue.

14          Q.     So there was no argument that you were  
15 responding to, correct?

16          A.     That is correct.

17          Q.     Thank you.

18                         So you went up there intending to argue  
19 outside the record, correct?

20          A.     I knew what my argument was going to be, yes.

21          Q.     Okay. So this was intentional when you went up  
22 there and argued as you did that we just discussed,  
23 correct?

24          A.     It was.

25          Q.     And you knew that was outside the record?

1           A.     I did, parts of it.

2           Q.     Well, all of it was outside the record.  Nobody  
3 testified or put in writing or any other form of evidence  
4 that said, I believe the death penalty is appropriate in  
5 this case.  Nobody testified to that, did they?

6           A.     That's correct.

7           Q.     So -- but you knew the worst that was going to  
8 happen is -- the worst that could happen is that the  
9 Defense would object and the judge would sustain the  
10 objection, correct?

11          A.     I don't know that I would characterize it as the  
12 worst that would happen.

13          Q.     Or she might instruct the jury to disregard,  
14 right?

15          A.     I don't know that I would characterize it as the  
16 worst.  I think the Defense could have objected, I think  
17 it could have been sustained, and then the jury would be  
18 instructed to disregard.

19          Q.     Well, of course, the judge could have granted a  
20 mistrial too.  I mean, that would have been the next level  
21 of relief the Defense would have asked for, right?

22          A.     That's right.

23          Q.     But you knew the judge wouldn't grant a mistrial  
24 on that, didn't you?

25                   MR. BRAGG:  Objection, Your Honor.  That's

1 pure speculation. I mean, it's categorical, oh, the judge  
2 would absolutely not and you knew that to be the case.  
3 Unless she had a conversation with the judge about that,  
4 that's pure speculation.

5 THE COURT: I'll sustain the objection at  
6 this time.

7 Q. (BY MR. WARE) Do you believe the judge would  
8 have granted a mistrial on that?

9 A. I don't know what she would have done. I doubt  
10 it.

11 Q. But you were willing to take that chance,  
12 correct?

13 A. I don't know that I thought about it in those  
14 terms.

15 Q. Well, you knew it was improper and you knew --  
16 and you knew that -- that there was a possibility that the  
17 judge could even go so far as to grant a mistrial,  
18 correct?

19 A. I think there was -- well, I think it stands to  
20 reason in any death penalty case that the families of the  
21 deceased want the death penalty. I think that is -- that  
22 is a -- something that is a given in a trial. Okay.

23 Q. So you could argue that in any case?

24 A. I think that is the case.

25 Q. Even though it's outside the record, that in any



1 case you don't even have to have a record on that?

2 A. It was outside of the record.

3 Q. Okay.

4 A. Correct.

5 Q. And that makes it improper?

6 A. And I should not have argued something that was  
7 outside of the record.

8 Q. Okay. But you were willing to do it. I mean,  
9 it was important enough for you to get that in front of  
10 the jury that you were willing to violate the rules in  
11 order to make that argument, correct?

12 A. It was outside the record and I should not have  
13 done that.

14 Q. But you did do it.

15 A. I did.

16 Q. And it was important enough for you to do that  
17 at the time that you were willing to break the rules in  
18 order to do it?

19 A. I didn't give it -- when I think about my  
20 argument, that is a very, very small part of my argument.  
21 When I think about the time that I spent drafting my  
22 argument or offering my argument or thinking about my  
23 argument, of all the points that I made, I probably spent  
24 the least amount of time on that one.

25 Q. But you thought it was important enough to make

1     that you were willing to break the rules to do it and  
2     argue outside the record in order to make it. It was at  
3     least that important.

4         A.     I don't know that I thought it was important,  
5     but I did argue outside the record.

6         Q.     Okay. And you knew that was breaking the rules?

7         A.     I knew it was outside the record.

8         Q.     Which is breaking the rules?

9         A.     I knew that an objection could have been made  
10    and sustained.

11        Q.     So. And let's look at what you did argue. You  
12    didn't reopen and put on anybody, whether there was  
13    anybody that could do it, to say that Jonas Cherry's  
14    family and everyone who loves him believes the death  
15    penalty is appropriate. You didn't put anybody on to say  
16    that?

17        A.     That's correct.

18        Q.     And in fact, probably based on many Supreme  
19    Court cases, probably had you tried to do that, it would  
20    not have been allowed into evidence, correct?

21        A.     Well, I think, as I said, in the absence of a  
22    defense mitigation case, I don't think it would have been  
23    allowed.

24        Q.     Okay. Well, even with a defense mitigation  
25    case, I mean, if you know the facts of Tennessee versus

1 Payne --

2 MR. BRAGG: Your Honor --

3 MR. WARE: -- where they say that's not  
4 allowed --

5 MR. BRAGG: At this point I object. We  
6 seem to be covering the same ground over and over, Your  
7 Honor.

8 MR. WARE: No, we're not.

9 MR. BRAGG: We've already discussed Payne.  
10 We've already discussed whether or not this information  
11 could come in. In fact, we've discussed the fact she  
12 didn't put on all the people that loved him. We already  
13 discussed this.

14 THE COURT: I think this is repetitive. If  
15 there's a new point, go ahead and ask that question.

16 Q. (BY MR. WARE) Here's the point. Here's the  
17 point. Not only did you argue outside of the record, you  
18 injected something in the record that even if it were true  
19 would be against the rules, even if it were true that  
20 Jonas Cherry's parents had suddenly changed their mind  
21 about the death penalty, even if that were true, you were  
22 injecting something into the record that you're not  
23 permitted under those cases to inject into the record.  
24 You're not permitted to tell the jury that Jonas Cherry's  
25 parents and everyone who loved him believed the death

1 penalty is appropriate. You can't put on testimony and  
2 you didn't put on testimony to that effect. So you're not  
3 just outside the record, you're arguing a fact --

4 MR. BRAGG: Objection, Your Honor.

5 MR. WARE: -- that you can't put --

6 MR. BRAGG: Is there a question here?

7 MR. WARE: -- correct?

8 THE COURT: All right.

9 THE WITNESS: I understand that I was the  
10 first attorney to argue and I was responding to -- that  
11 doesn't make it okay, it was outside of the record -- and  
12 I was responding to the Defense's request to spare his  
13 life.

14 Q. (BY MR. WARE) Well, let's just draw an analogy.  
15 Say a defendant, not this case, say a defendant failed a  
16 polygraph. Okay? Are you with me?

17 A. (Moving head up and down).

18 Q. I mean, say in this hypothetical that's a fact,  
19 a defendant failed a polygraph. Okay?

20 A. (Moving head up and down).

21 Q. You're nodding. Is that a yes?

22 A. I'm sorry, I was --

23 Q. You're following me?

24 A. Yes.

25 Q. And say there's no evidence in the trial that

1       this defendant failed a polygraph. Okay? Are you with  
2       me?

3           A.       Yes. I'm sorry.

4           Q.       And say you're at final argument. And, of  
5       course, polygraph tests aren't admissible anyway, right?

6           A.       That's right.

7           Q.       Everybody knows that, right? Correct?

8           A.       That's correct.

9           Q.       And almost everybody knows that what a victim's  
10       family wants to happen -- or that a victim's family wants  
11       the defendant executed, almost everybody knows that's not  
12       admissible as well. But in any event, we agree that  
13       polygraphs are not admissible, right?

14          A.       That's right.

15          Q.       Okay. So say you got up at final argument and,  
16       number one, you argued, and besides the defendant failed a  
17       polygraph, okay, I mean, number one, that would be outside  
18       the record, correct?

19          A.       That's correct.

20          Q.       And, number two, even if it wasn't outside the  
21       record, it's something you couldn't put in the record by  
22       law anyway, correct?

23          A.       That's correct.

24          Q.       And it's the same thing here. It was not only  
25       outside the record that Jonas Cherry's family and everyone

1     who loved him believed the death penalty was appropriate,  
2     it's something you couldn't put in the record, just like  
3     you couldn't put a polygraph test into the record.

4                     MR. BRAGG: Your Honor, objection. She's  
5     asked and answered these exact questions.

6                     MR. WARE: No, she hasn't.

7                     THE COURT: Well, I think this is  
8     repetitive. I'm going to sustain the objection.

9             Q.     (BY MR. WARE) But you -- it was important enough  
10    to you to get this information in front of the jury that  
11    you were willing to violate both of those rules outside  
12    the record and inadmissible evidence, correct? It was  
13    that important to you, correct?

14            A.     I don't think it was that important to me.

15            Q.     But you did it?

16            A.     I did do it.

17            Q.     Could have resulted in a mistrial, correct?

18            A.     I did not think it would result in a mistrial.

19            Q.     That's why you were emboldened to do it, right?

20    You knew you might get objected to, they might get  
21    instructed to disregard, but you knew that you weren't  
22    going to get a mistrial, didn't you, or you didn't believe  
23    you were?

24            A.     Mike, this was a very small part of my argument.

25            Q.     Let me just -- you didn't believe that was going

1 to get you a mistrial, did you?

2 A. I did not think it would result in a mistrial.  
3 I did not --

4 Q. So you were -- so you wanted -- you wanted the  
5 jury to hear that those two things outside the record and  
6 something that would not be admissible in front them, it  
7 was important enough to you to violate -- intentionally  
8 violate those two rules and you were emboldened to do it  
9 because you knew they would remember it and you weren't  
10 going to get a mistrial out of it anyway, right?

11 MR. BRAGG: Objection, Your Honor, asked  
12 and answered.

13 THE COURT: That has been asked and  
14 answered. I'll sustain the objection.

15 Q. (BY MR. WARE) Now, that's all assuming this is  
16 all true, correct? I mean, the fact is, if it wasn't even  
17 true that Jonas Cherry's family, which included certainly  
18 his parents, correct?

19 A. Yes.

20 Q. And everyone who loved him, which included his  
21 parents, correct?

22 A. Yes.

23 Q. If that wasn't even true that they believed the  
24 death penalty was appropriate, then that's a third  
25 violation, isn't it?

1           A.     Yes.

2           Q.     Now, assume for a moment that -- by the way,  
3     after you had this conversation with Glenn Cherry in the  
4     courtroom right before -- well, before final argument,  
5     after the last witness but before final argument, when you  
6     took from that that he had changed his mind on the death  
7     penalty -- you know what I'm talking about?

8           A.     Yes.

9           Q.     Okay. Did you then go over to the defense  
10    lawyers Larry Moore and Bill Ray and say, guess what, the  
11    Cherrys have changed their mind about the death penalty?  
12    Did you notify them of that?

13          A.     I did not.

14          Q.     So when you made that argument, they still  
15    thought the Cherrys were against the death penalty, didn't  
16    they?

17          A.     I would presume, yes.

18          Q.     So they would have thought that what you just  
19    told the jury was a lie, wouldn't they?

20          A.     Yes.

21          Q.     So it's your position that Larry Moore and Bill  
22    Ray just sat on their hands and allowed you to tell the  
23    jury what they thought at the time was a lie?

24                   MR. BRAGG: Objection, Your Honor. He's  
25    now asking her specifically what was in their minds at the



1 time. She can't testify to that, unless she knows, unless  
2 they had a conversation, she can't testify to specifically  
3 what was in their minds.

4 THE COURT: Any response to that objection?

5 MR. WARE: I mean, I can rephrase the  
6 question, Your Honor.

7 THE COURT: Rephrase the question.

8 Q. (BY MR. WARE) I mean, you had not informed them  
9 about the Cherrys' change in position. So as far as they  
10 knew, according to you, the Cherrys or Jonas Cherry's  
11 family and everyone who loved him did not think the death  
12 penalty was appropriate, because they didn't -- you did  
13 not inform them about your conversation with Glenn Cherry.

14 A. I did not inform them of the conversation with  
15 Glenn Cherry.

16 Q. Okay. I gotcha.

17 A. But -- that's okay.

18 Q. Nevertheless, they didn't object. You know,  
19 Your Honor, that's not true, you know, that's not true.  
20 They informed us that the Cherrys are against the death  
21 penalty. There was nothing like that in the record,  
22 correct?

23 A. One of the things that was talked about --

24 Q. I mean, let me get you to answer my question.  
25 Did they stand up and object to it?

1           A.     They did not object.

2           Q.     Even though it was outside the record, even  
3 though it was inadmissible evidence, and even though as  
4 far as they knew at that point it was a lie?

5           A.     One of the things that we talked about in jury  
6 selection was the fact that this family supported our  
7 prosecution of Paul Storey, that they respected the  
8 process.

9           Q.     There's no question about that.  
10                   So you offered life sometime in the spring  
11 of 2008, correct?

12          A.     Correct.

13          Q.     And you remember -- you may not have been there.  
14 There was an official hearing, I think it was June the  
15 9<sup>th</sup> of 2008, I know -- I don't know if it's on your  
16 timeline or not, when Paul Storey was questioned about the  
17 life offer and he officially turned down the life offer.  
18 Does that sound familiar?

19          A.     It does.

20          Q.     And even though Robert Foran at that time told  
21 him life would never be offered again or something to that  
22 effect, in fact, y'all did offer life again, right?

23          A.     That's right.

24          Q.     And it's your position you were keeping the  
25 Cherrys -- or somebody was keeping the Cherrys apprised of

1 all these life offers that were being made to the  
2 defendant?

3 A. I think at some point they were notified that a  
4 life sentence was offered. I don't know that there was  
5 continued communication at that point. My grandmother  
6 died right before we started jury selection, and so I was  
7 not involved for the case -- not involved with the case  
8 for a couple of weeks in there. She had a stroke and I  
9 cared for her. And then the jury selection was put off  
10 another week.

11 Q. Okay. Do you know when the last time a life  
12 offer was made to Paul Storey was?

13 A. I remember a conversation that I came in -- you  
14 mean a formal offer or do you mean when we left it  
15 outstanding?

16 Q. Well, the last time --

17 A. It was discussed?

18 Q. Yeah, sure.

19 A. Okay. I remember coming into jury selection,  
20 and Larry and I were there. And my husband and I had gone  
21 to mass on Sunday, and I lit a candle that Paul Storey  
22 would change his mind and do the right thing. And I came  
23 in and I told Larry, Larry, I lit a candle yesterday that  
24 he would change his mind, because Larry and Bill had  
25 expressed tremendous frustration with Paul and his mother

1 and their inability to grasp the reality of the case and  
2 of the situation and of the law of parties. And Larry  
3 said, well, that was a waste of a candle or that was a  
4 waste of a match, or something to that effect, because he  
5 said Paul is never going to take a life sentence.

6 And so in my mind -- can I give you the  
7 date? I cannot give you the date. But that was the last  
8 time that I recall us having a serious discussion or a  
9 discussion about --

10 Q. Was it after jury selection?

11 A. No, it was in jury selection.

12 Q. During jury selection?

13 A. It was in jury selection.

14 Q. Okay. Did -- of course, one of the things you  
15 could have done, you and Robert could have done is waived  
16 the death penalty; is that correct?

17 A. That is one of the things the office could have  
18 made the decision about, yes.

19 Q. Okay. Did you -- did you ever inquire whether  
20 you could waive the death penalty?

21 A. Did I ever ask a deputy --

22 Q. Your supervisor or whoever you needed to ask?

23 A. I did not.

24 Q. So did anything occur in between the time of  
25 this conversation when you talked about how you lit a

1 candle, etcetera, and the time that you proceeded to trial  
2 under the death penalty or -- or the time that the jury  
3 came back with the death penalty? Did anything happen  
4 during that time that you believed made Paul Storey more  
5 culpable or was aggravating or anything like that that  
6 would cause you to continue to pursue the death penalty  
7 even though you had offered a life sentence?

8 A. You mean like was there any disciplinary in  
9 jail?

10 Q. Yeah, after that time.

11 A. Or did he misbehave during jury selection?

12 Q. Anything, yes.

13 A. In addition to the extraneous offenses we  
14 already had, I don't believe there was any subsequent  
15 commission of a bad act or extraneous offense.

16 Q. Okay. And -- okay. So the answer is no?

17 A. The answer is no.

18 MR. WARE: Your Honor, if I could have a  
19 moment.

20 THE COURT: I'll just point out it's 11:52.  
21 Are you nearing completion?

22 MR. WARE: If we could go ahead and break  
23 for lunch, Your Honor, I think -- I think we may be done,  
24 but we may -- if I can have a few moments or the lunch  
25 hour to think it over, we may can speed this up.

1 THE COURT: Well, I'm all for speeding it  
2 up at this point.

3 THE WITNESS: I'm not going to take that  
4 personally.

5 THE COURT: As far as the State's  
6 anticipated cross, do you have any idea how long it might  
7 be?

8 MR. BRAGG: Oh, as far as how long it might  
9 be? I don't, Your Honor. I don't like to give too  
10 specific of -- I can tell you it won't last half a day.

11 THE COURT: But it will be longer than the  
12 next eight minutes, right?

13 MR. BRAGG: Say again?

14 THE COURT: It will be longer than the next  
15 eight minutes.

16 MR. BRAGG: It certainly will, yes.

17 THE COURT: Maybe the appropriate thing at  
18 this point is to take a lunch recess.

19 MR. WARE: Yes.

20 THE COURT: Is 1:15 an appropriate time to  
21 be back?

22 MR. WARE: Yes.

23 THE COURT: Why don't we recess for lunch  
24 until 1:15.

25 (Court in recess for lunch)

1 (Open court, defendant present)

2 THE COURT: Are both sides ready to  
3 continue at this time?

4 MR. BRAGG: We are, Your Honor.

5 MR. WARE: Yes, Your Honor.

6 THE COURT: All right. Before I forget  
7 about it, Mr. Ware, sometime ago right after you offered  
8 Exhibits 1, 2, and 3, I think you referenced Exhibit 3 as  
9 having been filed on July the 8<sup>th</sup> and the actually  
10 file-mark is July 10<sup>th</sup>.

11 MR. WARE: Okay.

12 THE COURT: Just for clarity, in case  
13 there's any question about which instruments are being  
14 identified.

15 MR. WARE: Thank you for keeping me honest,  
16 Your Honor.

17 THE COURT: Well, I've been dying to  
18 interrupt and say something for a while, but now --

19 MR. WARE: Nobody can say you weren't  
20 paying attention, Judge.

21 THE COURT: I try to. Anyway, just that  
22 clarification for the record.

23 All right. If everybody is ready, then,  
24 you may continue with your examination of the witness.

25 MR. WARE: Thank you, Your Honor.

1 Q. (BY MR. WARE) Ms. Jack, you know Robert Ford or  
2 you knew Robert Ford, did you not?

3 A. Robert Foran?

4 Q. Ford.

5 A. Oh, Bob Ford, I'm sorry.

6 Q. Bob Ford, yes.

7 A. Yes.

8 Q. Of course, he's -- he has -- he's deceased now.  
9 But were you aware that he was the first state writ  
10 attorney on this case?

11 A. I was.

12 Q. Okay. Did you ever talk to him about this case?

13 A. I think at some point he came through the court  
14 when he was either in the process of working on the writ  
15 or had completed the writ. And it was a docket setting,  
16 so there were a lot of attorneys in there. And he was  
17 talking to me and he was bragging about how he was going  
18 to get the case reversed. And he was laughing about it.  
19 He wasn't doing anything malicious. He was laughing about  
20 it because he said he had an affidavit from Sven Berger,  
21 and he was referencing the contents of that affidavit.

22 Q. Well, who's Sven Berger? Do you know who Sven  
23 Berger is?

24 A. He was one of the jurors in the case.

25 Q. Okay. You're aware he's a juror on the case



1       that's given an affidavit that says had he known the  
2       Cherrys were --

3                       MR. BRAGG: At this point, Your Honor, I  
4       would object to this line of questioning. Sven Berger and  
5       his affidavit have actually already been -- this  
6       particular affidavit, I think he's even on their witness  
7       list, has not been ruled upon. But this court has already  
8       ruled on that particular affidavit and found it to be --  
9       they actually struck it from the record in the initial  
10      state habeas proceedings, because he's a juror that's  
11      basically testifying about clearly what the rule prohibits  
12      him from testifying about.

13                    THE COURT: I understand there's usually a  
14      prohibition or inadmissibility question on that. But,  
15      Mr. Ware, do you have any response?

16                    MR. WARE: Well, first, I wasn't even going  
17      to ask about that affidavit. I was going to ask about --  
18      number one, I'm asking her if she knows who Sven Berger is  
19      since she brought him up, and if she knows that he's given  
20      an affidavit that goes directly to her testimony here  
21      today.

22                    MR. BRAGG: And to that we would raise the  
23      same objections to his affidavit in that was raised to the  
24      first affidavit. The Texas Rules of Evidence clearly  
25      prohibit that affidavit.

1                   THE COURT: There is an admissibility issue  
2 on that, for sure. I'm aware that the -- of the  
3 affidavits that have been filed, and it's in the open, for  
4 sure. I think what I'm going to do is allow the question  
5 at this point. If it's deemed to be inadmissible, the  
6 Court certainly doesn't have to consider it. So I'm going  
7 to allow that issue to be explored and we'll see where the  
8 law leads us on that. So you may continue with your  
9 question.

10           Q.     (BY MR. WARE) You're aware that Sven Berger has  
11 given an affidavit saying had he known that the Cherrys,  
12 that Jonas Cherry's parents were against the death penalty  
13 he would never, ever, ever have voted in such a way that  
14 the death penalty would be imposed and he'd held out  
15 forever. You're aware that he's given that affidavit?

16           A.     In his second affidavit, yes, I am aware of  
17 that.

18           Q.     Back to Bob Ford.

19                   You didn't talk to him about the Cherrys  
20 being against the death penalty, did you?

21           A.     I did not.

22           Q.     As far as you know, nobody talked to him about  
23 the Cherrys being --

24           A.     I can't speak to what other people may or may  
25 not have told Bob.

1 Q. But I said as far as you know.

2 A. I know that I didn't speak to him about it.

3 Q. Okay. And you're not aware of anyone who did  
4 speak to him about it?

5 A. I'm not aware of that.

6 Q. Okay. And you know from looking through, what,  
7 there's seven boxes of files in this case?

8 A. I don't recall.

9 Q. That the DA's office has?

10 A. I don't recall the exact number.

11 Q. A bunch? I mean, several big boxes?

12 A. There are a number of boxes, yes.

13 Q. And you've looked through them or had the  
14 opportunity to look through them recently?

15 A. I have.

16 Q. And you know that if Bob Gill -- excuse me, not  
17 Bob Gill -- but Bob Ford was given the same opportunity to  
18 look through those seven boxes and saw what you saw when  
19 you looked through them and didn't see what you didn't see  
20 when you looked through them, that he would not have seen  
21 one scrap of paper, one note, any reference to the fact  
22 that the Cherrys were opposed to the death penalty; is  
23 that correct?

24 MR. BRAGG: Objection, speculation, Your  
25 Honor. She doesn't know what Bob --

1 MR. WARE: I said if he saw what she saw.

2 THE COURT: With that qualification, I'll  
3 allow the question.

4 THE WITNESS: I think that's true, Mike.

5 Q. (BY MR. WARE) And Bob is -- was a tenacious  
6 lawyer; is that fair?

7 A. That is very fair.

8 Q. Ethical lawyer?

9 A. So far as I know.

10 Q. Even a ferocious lawyer --

11 A. Yes.

12 Q. -- from time to time?

13 A. I've tried him.

14 Q. Diligent?

15 A. Yes.

16 Q. Very diligent?

17 A. (Moving head up and down).

18 Q. Is that correct?

19 A. That is correct.

20 Q. That's your opinion. And you've known Bob a  
21 long time?

22 A. I had known Bob many years before his passing.

23 Q. Okay. I mean, he was in the DA's office?

24 A. Well, that predated me.

25 Q. Okay. But you'd known him many years. Honest

1 lawyer?

2 A. Yes.

3 Q. Okay. And all of those things I said about Bob  
4 Ford, be fair to say those same things about Larry Moore,  
5 correct?

6 A. I am tremendously fond of Larry Moore. The fact  
7 that we are in this courtroom and that someone that I  
8 consider a good friend of mine will be testifying, I can  
9 only imagine the contradiction. It's very upsetting to  
10 me. There was a time that I was and am very fond of Bill  
11 Ray and Larry Moore.

12 Q. Well, the fact is we've all known each other for  
13 25 years or more; is that correct?

14 A. I don't know that I've known you quite that  
15 long, but I've known you for a number of years. I don't  
16 know co-counsel.

17 Q. I've known Larry Moore for 47 years. Think  
18 about that. Would you agree that he likewise is tenacious  
19 and ethical and diligent?

20 A. Larry Moore, this is my second death penalty  
21 case with Larry. I held him and I hold him in highest of  
22 esteem.

23 Q. And you believe that he's honest and ethical?

24 A. I do.

25 Q. And diligent?

1           A.     And diligent.

2           Q.     Same with Bill Ray?

3           A.     The same with Bill Ray.

4           Q.     The same with Tim Moore?

5           A.     The same with Tim Moore.

6           Q.     As to all of those attributes?

7           A.     That is true.

8           Q.     Same with Mark Daniel?

9           A.     I have not had a case -- well, I take that back.  
10    I had a death penalty case against Mark Daniels (sic). I  
11    think Mark is a very effective lawyer. I think Mark is a  
12    very smart lawyer.

13          Q.     Certainly diligent?

14          A.     I think he's diligent, yes.

15          Q.     A lawyer by the name of John Stickels had this  
16    case on direct appeal. Did you ever have a conversation  
17    with John Stickels about this case?

18          A.     If I did, it was only in passing and it doesn't  
19    stand out, but that's not to say that there wasn't some  
20    conversation that I had.

21          Q.     Okay. But you don't think you ever had a  
22    conversation where you told him that the Cherrys were  
23    against the death penalty?

24          A.     No.

25          Q.     And you certainly never had a conversation with

1 him where you told him the Cherrys were against the death  
2 penalty until the close of evidence and then you had this  
3 conversation with Mr. Cherry, you never went into that  
4 with John Stickels?

5 A. That's right.

6 Q. Or any of these other lawyers?

7 A. That's right.

8 MR. WARE: I'll pass the witness, Your  
9 Honor.

10 THE COURT: All right. The State may  
11 cross-examine the witness then at this time.

12 MR. BRAGG: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. BRAGG:

15 Q. Good afternoon, Ms. Jack.

16 A. Good afternoon.

17 Q. I'd like to go back to my opposing counsel  
18 starting with the length of time you've served as a  
19 prosecutor and a defense attorney. But I'm curious, you  
20 mentioned a couple of cases that you worked on that are  
21 capital murder cases.

22 When you were a prosecutor, how many  
23 capital cases did you work on? And I don't mean just  
24 those that you took to trial in front of a jury. How many  
25 capital cases did you work on?

1           A.     Are you asking me about cases in which the death  
2     penalty was waived as well as those where the death  
3     penalty was sought?

4           Q.     Yes, ma'am.

5           A.     I cannot give you an exact number. I tried more  
6     capital waivers than I did simple homicide cases. I can't  
7     even give you a number. Probably ten, 20 plus. I mean,  
8     but when you say work on, are you saying outside of the  
9     presence of trying it?

10          Q.     Yes, ma'am.

11          A.     Oh, I can't even count the number of cases that  
12     I was involved in either working with the police  
13     department, assisting other prosecutors, investigating  
14     them at the grand jury, handling them after the grand  
15     jury.

16                     I was a chief prosecutor from 1998 until  
17     2013, so for all of those years as the chief prosecutor  
18     for the respective courts where I was assigned, I would  
19     have been responsible for any capital murder case that was  
20     assigned to those courts.

21                     And then as a deputy chief, I would have  
22     had supervisory responsibility over at least four district  
23     courts and a specialized unit, generally speaking. So I  
24     can't even begin to estimate the number of capital murder  
25     cases I was involved in.



1           Q.     What about capital murder cases where the death  
2     penalty was sought and taken -- that went to trial?

3           A.     Okay.  That -- I tried six cases from beginning  
4     to end where the death penalty was sought, including one  
5     in which I was the special prosecutor -- I was a special  
6     prosecutor in another county.

7           Q.     And now as a defense attorney, how many capital  
8     cases, again, just capital cases, whether there was a  
9     waiver or the death penalty was sought, how many death  
10    penalty cases have you handled?

11          A.     Well, I have -- I believe I'm involved currently  
12    in six or seven at the moment.  I have tried before a jury  
13    one with Warren St. John earlier this year.  I have tried  
14    one that wound up being an open plea to the Court to the  
15    lesser-included offense of injury to a child with Tim  
16    Moore in front of The Honorable Scott Wisch.  I have cases  
17    that are outstanding with Fred Cummings, Joetta Keene,  
18    Warren St. John, and I'm forgetting someone.

19          Q.     But these are capital cases?

20          A.     Yes.

21          Q.     And the Tim Moore that you mentioned there, that  
22    was the Tim Moore that was Mark Porter's attorney?

23          A.     Yes.

24          Q.     The same Tim Moore that opposing counsel just  
25    asked you about?

1           A.     Yes. We concluded that matter about a week ago.

2           Q.     I am curious, and I guess we can take Tim Moore,  
3 for example. Of course, this writ has been filed now for  
4 several months?

5           A.     I believe it was filed in April of this year.

6           Q.     Correct. Have you and Tim Moore discussed this  
7 at all?

8           A.     This case?

9           Q.     Yes, ma'am.

10          A.     No, we have not.

11          Q.     Has he mentioned to you at all any concern that  
12 he has about you serving as co-counsel with him?

13          A.     No.

14          Q.     During your career either as prosecutor or  
15 attorney, have you received any accolades, commendations,  
16 any awards, honors?

17          A.     I have.

18          Q.     What are those?

19          A.     Well, I received the Chris Marshall Award a  
20 number of years ago, and that is an award that is given to  
21 a prosecutor for statewide training. And I was a  
22 co-recipient of that award.

23                   I was recognized by I believe it is the  
24 Texas Lawyer as being one of the top prosecutors in the  
25 state in 2012.

1 I recently received an award from my law  
2 school for public service. I've been profiled in a number  
3 of publications, I'll put it that way.

4 Q. I'd like to ask you about the trial file in this  
5 case. Opposing counsel asked you on direct about several  
6 documents, including your trial notes. Did you deviate  
7 from your normal practice and procedure with regard to how  
8 you handled these documents?

9 A. No.

10 Q. So do your recollections say with regard to the  
11 notes you made during trial, you didn't deviate from any  
12 procedure or practice that you would usually do in a case?

13 A. No.

14 Q. Now, I believe you testified on direct that  
15 Mr. Foran asked you on to the case?

16 A. He did.

17 Q. He asked you on the case you said at the end of  
18 '07, beginning of '08?

19 A. I think it's more like the beginning of '08.

20 Q. Do you recall when you had your first  
21 interaction with Jonas' parents, that being Glenn and  
22 Judy?

23 A. I do not.

24 Q. What about Suman?

25 A. If you're asking me for a specific date, I

1 don't.

2 Q. But generally around that spring of 2008 time?

3 A. Yes.

4 Q. Would you say that you developed a close  
5 relationship with the victim's family?

6 A. I think during the trial I was there to answer  
7 any questions and to explain anything that was going on.  
8 That is something that I consider very important, and I  
9 did as a prosecutor. And as a defense attorney, I think  
10 it's equally important to explain to clients and their  
11 families the process and how we got to this point, what to  
12 expect going forward and what we can have -- or what we  
13 can anticipate in the future.

14 Q. Can you tell the Court a little bit about your  
15 relationship with specifically the Cherry family?

16 A. Well, as I said earlier, I lived next door to  
17 one of their relatives. And I think that it was Glenn's  
18 mother. I recall seeing Glenn at the house next door to  
19 where my husband and I lived when we were first married.  
20 And from time to time, I would talk to him and I would  
21 talk to, if it was his mother, I would talk to her.

22 My husband recalled or recounted to me  
23 later that he and Jonas actually played basketball  
24 together. And when I got on the case, I did not even  
25 really make the connection that those Cherrys were related

1 to my neighbor. I didn't even make the connection  
2 initially.

3 Q. So during the time of trial -- I mean, you  
4 talked a little bit about the time of trial and how you  
5 were there to answer their questions, how you were trying  
6 to help them get a picture of the process and understand  
7 the process. What about leading up to trial? You said  
8 about the spring of '08 is when you first met them or came  
9 to know them. What was your relationship or your contact  
10 like with them?

11 A. I think Robert had more contact with them  
12 leading up to trial. I think I had more contact with them  
13 during trial. And I think that they were very fond of me  
14 during the trial and after the trial. And I think that is  
15 reflected in their comments after the trial -- actually  
16 during the trial and after the trial and in the weeks that  
17 followed.

18 Q. I believe you said on direct that you could not  
19 place an exact time as to when you first learned of Glenn  
20 and Judy's opposition to the death penalty; is that  
21 correct?

22 A. That's correct.

23 Q. But you did understand it to be a general  
24 opposition to the death penalty?

25 A. Yes.

1           Q.     This was an opinion they held before their son  
2 was ever brutally murdered by Paul Storey?

3           A.     This was not an opinion that was formed as a  
4 result of this crime.

5           Q.     So their opinion prior to trial had no bearing  
6 on who Paul Storey was, correct?

7           A.     That's exactly right.

8           Q.     Had no bearing on what they learned about him,  
9 correct?

10                   MR. WARE:   I'm going to object to her  
11 testifying to what the basis of the Cherrys' opposition to  
12 the death penalty was. She seems to have very sketchy  
13 information about the fact that they were even against the  
14 death penalty. And I'm going to object to her getting  
15 into the details, the moral, ethical, spiritual reasons  
16 that the Cherrys were against the death penalty in general  
17 and in this case.

18                   THE COURT:   Any response?

19                   MR. BRAGG:   Yes, Your Honor. My questions  
20 aren't directed to necessarily the foundations for why  
21 their -- why they developed this belief or this opinion  
22 against the death penalty. It's just to simply lay the  
23 groundwork that the opinion was formed before this case  
24 and it had nothing to do specifically with Paul Storey.  
25 And she has testified that she talked to them about the

1 death penalty and about their opposition to it.

2 MR. WARE: Well, Your Honor, the Cherrys  
3 are going to testify. They can testify to that.

4 THE COURT: And I'm sure they will. But  
5 I'm going to go ahead and allow the question at this  
6 point.

7 MR. WARE: So my objection is foundation.  
8 She is not qualified to testify to this. And they've not  
9 laid the proper foundation to establish her as qualified  
10 to testify about all the ins and outs of why the Cherrys  
11 were against the death penalty.

12 THE COURT: Any other response to the  
13 objection?

14 MR. BRAGG: No, Your Honor.

15 THE COURT: I'm going to overrule the  
16 objection and permit the questioning at this point.

17 MR. BRAGG: Thank you, Your Honor.

18 Q. (BY MR. BRAGG) Now, did Suman -- or do you  
19 recall learning that Suman was in favor of the death  
20 penalty?

21 A. Yes.

22 Q. Did she tell you that Jonas was also in favor of  
23 the death penalty?

24 A. Yes.

25 MR. WARE: Well, once again, I'm going to

1 object to all this as hearsay. If Suman is going to  
2 testify, then we should hear it from her. And as far as  
3 what Jonas was for or against, that's, you know, double  
4 hearsay.

5 THE COURT: I'll sustain the hearsay  
6 objection at this point and we'll see what they say. The  
7 State may continue.

8 Q. (BY MR. BRAGG) Now, you did talk about Glenn and  
9 Judy's change in opinion with regard to this particular  
10 case. Now, am I correct in understanding that that  
11 occurred during the trial?

12 A. Yes.

13 Q. While they were watching the proceedings  
14 happening?

15 A. I think it was somewhat -- I think their opinion  
16 changed. I think their opinion kind of evolved over time  
17 as they --

18 MR. WARE: I'm going to object to  
19 speculation --

20 MR. BRAGG: Your Honor, he was asking these  
21 exact --

22 MR. WARE: -- foundation.

23 MR. BRAGG: He was asking these exact same  
24 questions on direct.

25 MR. WARE: Well, then it's repetitive.



1 MR. BRAGG: Well, no. You asked your  
2 questions -- he asked his questions, now I get to ask  
3 mine, Your Honor.

4 THE COURT: I'm going to overrule the  
5 objection and allow the cross-examination on this issue.

6 MR. BRAGG: Thank you, Your Honor.

7 Q. (BY MR. BRAGG) So my question was, and maybe  
8 I'll frame it a little different way. Your conversations  
9 leading up to trial, was it still your understanding that  
10 they had -- that Glenn and Judy had a general opposition  
11 to the death penalty?

12 A. Yes. However, they understood and they  
13 respected and they supported -- when Mr. Storey rejected  
14 the life sentence, they supported our decision to  
15 prosecute him with the knowledge that we were seeking the  
16 death penalty.

17 Q. And so that -- by support, how do you -- how  
18 would you define that or how could you better explain  
19 that?

20 A. When I think of support, I think of not only  
21 their comments but I think of their actions. I think of  
22 the comments that were made to me. I think of their  
23 desire to be present during this trial. I think of their  
24 desire to -- to remain a witness to the punishment phase.

25 There is nothing that required them to sit

1 through this entire trial to interact with us, to be a  
2 part of this. And that was their choice. And they  
3 understood that we were seeking the death penalty and at  
4 no point did they say include me out. They could have  
5 left after guilt-innocence, but they chose to stay.

6 They chose to witness this entire trial,  
7 and at the end of the trial -- I mean, in guilt-innocence,  
8 after we received the guilty verdict, the Cherrys hugged  
9 me and they thanked me. When we received the death  
10 sentence, the Cherrys hugged me and they thanked me.

11 They were present during our closing  
12 arguments, and in particular they were present during my  
13 closing argument in punishment. When it was all over,  
14 Judy said to me, I'm glad we did this. And so when I say  
15 support, I'm taking into account that compilation of words  
16 and actions.

17 Q. Who was the first chair for the prosecution  
18 team?

19 A. Robert.

20 Q. Who was the first chair for the Defense team?

21 A. Bill Ray.

22 Q. Now, you testified on direct that Robert  
23 represented to you that he had had at least a conversation  
24 with Bill Ray about the Cherrys' opposition to the death  
25 penalty?

1           A.     He represented to me that there were multiple  
2     conversations, not just one.

3           Q.     Okay. And those conversations surrounded --  
4     they also entailed the offer for life that was on the  
5     table; is that correct? As Robert represented to you?

6           A.     Yes. Okay. I want to make sure I understand  
7     what you're saying. Robert told me he conveyed a life  
8     sentence.

9           Q.     Right.

10          A.     Yes.

11          Q.     And did he tell you -- I guess my question then  
12     is, did he represent to you that the conversations  
13     involving a life sentence and the conversations involving  
14     the Cherrys' opposition to the death penalty, were they in  
15     any way intertwined or you just don't know?

16          A.     I don't know.

17          Q.     Now, you did talk about, though, that when, as  
18     far as you were concerned, you can remember yourself  
19     having a conversation during the jury selection, I'm  
20     sorry, about the Cherrys' opposition to the death penalty?

21          A.     Yes.

22          Q.     And you had that conversation with defense  
23     counsel?

24          A.     And I -- I -- it would make it much easier if I  
25     could tell you who was sitting in the room or whether both

1       were sitting in the room, but I can't do that.

2           Q.       How long was voir dire in this case?

3           A.       I believe it was four weeks, but I want to  
4       check.

5           Q.       Well, if I represented to you it was actually  
6       five weeks, would you have any reason to disagree with  
7       that?

8           A.       No. I know it began on July the 21<sup>st</sup> and we  
9       concluded -- the jury was seated and sworn on August the  
10      20<sup>th</sup>.

11          Q.       So during the portion of that over about a month  
12      time, if not over a month time, you recall a conversation  
13      taking place?

14          A.       I do.

15          Q.       Regarding -- with defense counsel?

16          A.       I do.

17          Q.       Regarding the Cherrys' opposition to the death  
18      penalty?

19          A.       I do.

20          Q.       You just simply can't place the exact date it  
21      happened on?

22          A.       Right. I remember there being more than one  
23      conversation.

24          Q.       With defense counsel?

25          A.       Yes.

1                   MR. WARE: I would ask that he be specific.  
2 Defense counsel Bill Ray, Larry Moore, both, or she has no  
3 idea.

4                   MR. BRAGG: Your Honor, that's a question  
5 they can ask on redirect.

6                   THE COURT: And I think it's probably  
7 already been asked on direct. If you'd like to form that  
8 question, you may, but I'm going to permit the question --

9                   MR. WARE: If counsel just wants to keep it  
10 vague, I guess that's okay.

11                  THE COURT: All right. You may proceed  
12 with the next question.

13                  MR. BRAGG: Thank you, Your Honor.

14                  Q. (BY MR. BRAGG) Regarding the life offer, can you  
15 explain why it was left on the table for so long?

16                  A. I think there were a number of reasons why it  
17 was left on the table. I think one of those reasons for  
18 me was -- were the parents of Jonas Cherry.

19                         In addition to that, Mr. Moore -- Larry and  
20 Bill had expressed tremendous frustration with Mr. Storey.  
21 They had expressed that the family did not understand the  
22 law of parties. And try as they might time and time  
23 again, Mr. Storey and his mother did not grasp what they  
24 believed was going to happen.

25                         In addition to that, Larry and Bill had

1     been colleagues of ours for many, many years. So it was  
2     also a professional courtesy that we extended it longer  
3     than I ever had in any other case.

4                     And I would also add that because of my  
5     grandmother's death, my personal circumstances, it would  
6     have been much easier for Paul Storey to have taken a life  
7     sentence. But my personal circumstances do not enter into  
8     the decision of the office. And so I really did not feel  
9     like my personal -- that I should go to anybody and say,  
10    look, in this situation my family is going through this,  
11    maybe we should waive the death penalty. I didn't think  
12    that played or should play any part in it. So I did not  
13    ask for that.

14       Q.     Did y'all inform the Cherrys of the life offer?

15       A.     Yes.

16       Q.     You informed Glenn -- Glenn Cherry?

17       A.     Yes.

18       Q.     You informed Judy Cherry?

19       A.     Yes.

20       Q.     And you informed Suman Cherry?

21       A.     Yes.

22       Q.     Would you ever make a life offer in a death  
23    penalty case or in a case where the death penalty is being  
24    sought, would you ever make a life offer without informing  
25    the victim's family?

1           A.     No.   No.

2           Q.     Did you also inform the Cherrys of the life  
3 offer that was given to Mark Porter?

4           A.     Yes.

5                     And when Tim Moore approached during  
6 closing argument -- well, he didn't approach during  
7 closing argument. Tim Moore came into the courtroom when  
8 we were in the middle of closing argument. And once we  
9 concluded closing arguments, Tim Moore approached, and I  
10 forget if he approached Robert or if he approached me or  
11 if we were standing there together, and asked if the life  
12 sentence offer for Mark Porter was still on the table.

13                    And we also informed the Cherrys that day.  
14 I don't know if they were still in the courtroom at that  
15 point, I suspect they were still in the courtroom, and we  
16 told them then, or we told them up in victim assistance.  
17 And -- because we said yes, and Tim was going to go across  
18 the street and talk to his client in the jail then.

19           Q.     You testified the Cherrys were present for the  
20 majority of trial, and that would include Glenn and Judy  
21 and Suman?

22           A.     I have a distinct memory of the Cherrys being in  
23 the courtroom. I believe Suman also was in the courtroom,  
24 but I can't recall if she was there to the extent that the  
25 Cherrys were.

1 Q. The par-- Glenn and Judy were?

2 A. Yes. I believe she was, but I'm not positive.  
3 Because I think at that time she was living out of town.  
4 I think she was in Houston I believe at the time.

5 Q. But Glenn and Judy were there for all of  
6 guilt-innocence? The majority of guilt-innocence?

7 A. I believe that they were present during all of  
8 guilt-innocence but for two witnesses. I know that I  
9 remember I gave them -- I explained to them who the next  
10 two witnesses or when those witnesses were going to  
11 testify, and that would be the pathologist and the crime  
12 scene. And it was a particularly brutal crime scene and I  
13 did not want the Cherrys to see that if they could avoid  
14 it, or at least wanted it to be their choice.

15 Q. Did they listen to your closing arguments, the  
16 State's closing arguments in guilt-innocence?

17 A. Yes.

18 Q. Now, moving to punishment, did they sit through  
19 punishment?

20 A. Yes.

21 Q. The majority of punishment?

22 A. I believe they sat through all of punishment.

23 Q. Suman testified during punishment, didn't she?

24 A. She did.

25 Q. That testimony was quite powerful, wasn't it?



1           A.     It was perhaps one of the most compelling victim  
2     impact statements I had heard. And I've tried probably in  
3     excess of 200 jury trials. Now, at that time I can't say  
4     I tried 200, but I tried in excess of probably 150 at the  
5     time that I tried that case.

6           Q.     We don't need to go through it line by line  
7     because the Court can go and read the record. But can you  
8     describe why it was so powerful, just generally?

9           A.     She and Jonas had been married -- they were  
10    about to celebrate their first anniversary. They had made  
11    the decision to begin their family, and they were about to  
12    embark upon trying to have kids. And they were each  
13    other's best friends.

14                   And not only was her testimony powerful  
15    because of the emotion, but she was very eloquent when she  
16    described the loss that she suffered and the heartbreak,  
17    that she could not go back and live at that house ever  
18    again, that she had to be medicated at night to sleep.  
19    And, you know, there were a number of jurors that were  
20    tearful during her testimony.

21          Q.     But you did not ask Suman whether she believed  
22    that Storey should get the death penalty, did you?

23          A.     Oh, when she testified, no.

24          Q.     Right. I'm sorry. Yes. When she's on the  
25    stand, you did not ask her in front of the jury?

1           A.     Right.  That's correct.

2           Q.     I know you had some discussion on direct about  
3 how or whether or not that testimony was -- would such  
4 testimony would be proper.  Certainly at that time you  
5 didn't think it was proper to ask her that question?

6           A.     I thought that testimony would be inadmissible  
7 to ask her that at that point.

8           Q.     And I believe on direct you said it was your  
9 understanding of the case law that it was clear, or at  
10 least that the case law made it clear that, generally  
11 speaking, without any kind of reservations to what that  
12 testimony would be, victims' families' testimony with  
13 regard to the ultimate question of life or death is simply  
14 not something that can be asked of a witness; is that  
15 correct?

16          A.     That's correct.

17          Q.     Had the Defense put on the Cherry family,  
18 Mr. and Mrs. Cherry to testify as to their opinion on  
19 death, the general opposition or whatever, would you then  
20 have responded in kind, and let's say they put that on and  
21 the judge allows it to go forward, would you have then  
22 sought to put on Suman as a rebuttal to that?

23          A.     I can't say 100 percent, but I can say that it  
24 would have been a very serious discussion.  I probably  
25 would have done that.

1           Q.     Let me ask you as a defense attorney, would you  
2     ever call the -- a family member of a victim to testify as  
3     to the -- whether or not a defendant should receive life  
4     or death?

5           A.     I've never been in that position.

6           Q.     Okay. Fair enough. Let's say you ever find  
7     yourself in that position, do you think you would call  
8     them?

9           A.     Well, I think that testimony is inadmissible.

10          Q.     Do you recall Paul Storey's mother testifying?

11          A.     I do.

12          Q.     And I believe on direct you discussed somewhat  
13     about the conversation that occurred afterwards?

14          A.     Uh-huh.

15          Q.     That conversation involved Glenn Cherry,  
16     correct?

17          A.     Yes.

18          Q.     Okay. Now, of course, after -- whenever a trial  
19     reaches a break, either a lunch break or a midday break,  
20     it's your experience that, generally speaking, the  
21     courtroom kind of becomes abuzz?

22          A.     Right.

23          Q.     Different conversations break out?

24          A.     (Moving head up and down).

25          Q.     You may need to talk to your --

1           A.     Investigator or someone else.

2           Q.     Investigator, someone else, your co-counsel.  
3     You may need to talk to any number of people about any  
4     number of things?

5           A.     (Moving head up and down).

6           Q.     Could you -- I'm sorry, could you verbalize that  
7     nod?

8           A.     I'm sorry.  Yes, at breaks we would frequently  
9     do that.  And, you know, we would also turn around to see  
10    how the family was doing, if they had any questions, or if  
11    they had any comments about a witness or how testimony was  
12    going.  Or, I mean, generally, you know, we'd ask an  
13    investigator, hey, we need to get this next witness ready  
14    or can you go get them from victim assistance or has the  
15    witness arrived, do we have this.  We frequently take  
16    breaks and talk to people behind us.

17          Q.     And so I think we've all experienced this as  
18    attorneys in trial.  But it's fair to say that you would  
19    maybe jump from one conversation to another.  You might,  
20    while you're talking with your investigator, overhear  
21    something and turn to that conversation.  Is that fair to  
22    say?

23          A.     Yes.

24          Q.     So I know you testified on direct you can't  
25    recall exactly, you know, at what point in the

1 conversation that you turned your attention to Glenn  
2 Cherry; is that correct?

3 A. That's right.

4 Q. You can't remember exactly --

5 A. I mean, I'm trying to remember how -- I know  
6 where I was standing. I know where he was standing. I  
7 recall Robert standing generally to my right, and I  
8 believe that Judy was behind him to his right, my left.  
9 And I don't know if I was looking right at him and was  
10 listening to another conversation or if I was looking at  
11 someone else when he -- when the conversation began.

12 Q. So you said you know where you were standing.  
13 Were you standing at counsel table?

14 A. No. No, no, no. I had turned and can't -- and  
15 this courtroom is not exactly -- it's not the same layout  
16 as the court we were in. I can't recall if I was this  
17 side of the rail or the other side of the rail; in other  
18 words, I'd gone past the swinging door.

19 Q. Uh-huh.

20 A. But he approached us.

21 Q. He being Glenn?

22 A. I'm sorry, he being Glenn.

23 Q. Approached you and Robert?

24 A. Yes. And that had happened from time to time  
25 during the trial.

1           Q.     And so when he approached you and, again, you  
2 testified that there was some degree of conversation that  
3 occurred right before you turned to -- you turned your  
4 attention to Glenn; is that correct?

5           A.     Yes, that's correct.

6           Q.     But when you did turn your attention to Glenn,  
7 at some point during the conversation that you heard, your  
8 testimony is that Glenn said -- well, you go ahead and say  
9 it in the words that you recall.

10          A.     He either said, do you want me to or should I  
11 testify or tell the jury that we want the death penalty.

12          Q.     And again, this is before your closing  
13 arguments?

14          A.     This was before closing arguments.

15          Q.     What did that mean to you when he said that?

16          A.     What that meant to me is that after listening to  
17 guilt-innocence and all of the evidence, after listening  
18 to all of the punishment phase, and both the Defense  
19 mitigation case and our case, that they had reached the  
20 opinion that the death penalty was appropriate.

21          Q.     Going back real quick to Paul Storey's mother --  
22 or mother testifying and the other witnesses that  
23 testified on his behalf and the witnesses that testified  
24 that his life should be spared, those witnesses were  
25 speaking of personal stories about Paul Storey?

1           A.     Yes.

2           Q.     Sorry for the unintentional word choice there.

3                     When they asked the jury in whatever form  
4 or fashion to spare Paul Storey's life, it was generally  
5 tied specifically to Paul Storey, to their belief that he  
6 is a good person and --

7           A.     Yes.

8           Q.     -- should be saved?

9           A.     Yes, it was. And, I mean, there was a mixture  
10 of witnesses that testified, his mother, his estranged  
11 father, his brother. I believe there were two to three  
12 teachers from the alternative school where he graduated.  
13 I believe there were two or three friends of his mother's  
14 who had ridden the bus with her and had -- had Paul drive  
15 their children to and from school. But they all gave  
16 personal anecdotes involving Paul.

17          Q.     So going back to Paul Storey's mother's --  
18 mother finishes testifying and you have your conversation  
19 with Glenn, did that affect your -- how you presented your  
20 closing arguments?

21          A.     Yes, it did.

22          Q.     Could you describe how?

23          A.     I think that in light of the case that the  
24 Defense presented, that there is an argument that the  
25 Cherrys' position --

1                   MR. WARE: I'm going to object as  
2 unresponsive. He asked how that affected her closing  
3 argument.

4                   MR. BRAGG: Your Honor, I believe a  
5 nonresponsive objection would be mine to make. I'm asking  
6 the question, I'm perfectly fine with her response.

7                   MR. WARE: I think I'm entitled to an  
8 unresponsive answer -- objection as well, Your Honor. I  
9 don't think the State of Texas has an exclusive right to  
10 making unresponsive objections.

11                  THE COURT: I understand that the Defense  
12 can raise objections, but I'll just say just respond in a  
13 responsive fashion if you will.

14                  Q. (BY MR. BRAGG) So let me ask this question.  
15 What were you about to say, please?

16                  A. That I wrestled with whether or not tactically  
17 or strategically I should have put them on the stand to  
18 say that they were in favor of the death penalty. I  
19 wrestled with that because we closed that day and we  
20 argued the next morning, as I recall.

21                  Q. And tell us, when you say you wrestled with it,  
22 I think you even testified on direct that you wrestled  
23 with it that night. You don't mean to say that you were  
24 contemplating calling them back. You were kind of doing a  
25 second-guessing?



1 A. Yes.

2 Q. Arm-chair quarterback if you will?

3 A. Yes.

4 And it wasn't just the Cherrys, it was  
5 Suman as well.

6 Q. Could you explain that a little bit?

7 A. Well, it wasn't just Judy and Glenn Cherry, it  
8 was Suman. Tactically, did I make a mistake in not  
9 putting them on the stand to express their feelings about  
10 the appropriateness of the death penalty.

11 Q. Your closing arguments in this case lasted about  
12 15 pages; is that correct? Would you have a reason to  
13 disagree with me that they lasted about 15 pages?

14 A. Thereabouts, yes. No, I would not disagree with  
15 you.

16 Q. As far as you're aware, the complaint that's  
17 been discussed in the subsequent writ, the complaint  
18 that's -- the comment that's been talked about today  
19 amounts to one sentence, one sentence in specific,  
20 correct?

21 A. Yes.

22 Q. Okay. And that sentence is: And it should go  
23 without saying that all of Jonas' family and everyone who  
24 loved him believe the death penalty is appropriate.  
25 Correct? That's your understanding that that's the

1 sentence we're talking about?

2 A. That was my argument, yes.

3 Q. You did not interview all of Jonas' family, did  
4 you?

5 A. I did not.

6 Q. You did not speak to everyone who loved him?

7 A. I did not.

8 Q. You did not put on testimony of -- from all of  
9 Jonas' family?

10 A. I did not.

11 Q. You didn't put on testimony from everyone who  
12 loved him?

13 A. I did not.

14 Q. The jury was aware of that fact?

15 A. They were.

16 Q. Once you were done with your closing arguments,  
17 and I think you've discussed this a little bit, but what  
18 was -- what kind of interactions did you have there in the  
19 courtroom once you were done with closing arguments?

20 A. The Cherrys were very grateful. They were very  
21 complimentary. They praised our arguments. And I believe  
22 they went to victims assistance after that.

23 At some point there was a discussion  
24 because -- not contemporaneous but around that same time,  
25 Tim Moore approached and asked if the life sentence was

1 still on the table. That was also a part of the  
2 discussion. But I can't recall whether or not we had that  
3 discussion in the courtroom or whether we had it  
4 upstairs -- well, that was downstairs to us, victims  
5 assistance on the fifth floor.

6 Q. Did they mention to you at any point this  
7 statement?

8 A. No.

9 Q. Did they mention to you at any point of feeling  
10 that you had somehow misrepresented --

11 A. No.

12 Q. -- their opinions?

13 A. No.

14 Q. Were they angry with you at all?

15 A. No.

16 Q. Did they mention that you had lied at all?

17 A. No.

18 Q. After the verdict occurred, did you have any --  
19 what conversations, if any, did you have with the Cherrys  
20 there in the courtroom?

21 A. Anytime a death sentence is imposed, it's not  
22 something that anyone celebrates, nor should it be. It's  
23 a long, exhausting process, and it's extracts a toll on  
24 all of the parties involved and the family as well. But  
25 the Cherrys hugged me, they thanked me, and Mrs. Cherry

1       said, I'm glad we did this.

2           Q.       When she says this, what do you take from that?  
3       What do you take?

4           A.       The taking --

5                   MR. WARE:   I'm going to object as  
6       speculation.

7                   MR. BRAGG:   Your Honor, I'm simply -- I'm  
8       not asking her to speculate as to what Mrs. Cherry said,  
9       what Mrs. Cherry meant by this. I'm asking her what did  
10      she take from that statement.

11                  THE COURT:   I'm going to allow the question  
12      at this time. Overruled.

13                  THE WITNESS:   I took it to mean that they  
14      appreciated the process and, though it was not easy, they  
15      were at peace with the verdict.

16           Q.       (BY MR. BRAGG)   Because they had gone through the  
17      process?

18           A.       Because they had watched the entire trial.  
19      Because they had listened to the evidence. Because they  
20      learned all of the steps that Paul Storey and his  
21      associate went through in preparing and planning and  
22      carrying out this execution. And they learned of the  
23      hours, when the Cherrys and Suman were devastated, Paul  
24      Storey and his associate Mark Porter were celebrating and  
25      laughing. And they watched all of that. And it is

1 painful. But I think -- they understood why there is a  
2 place for the death penalty.

3 Q. After the trial was over, you received a card  
4 from the Cherrys, did you not?

5 A. I did.

6 MR. BRAGG: May I approach, Your Honor?

7 THE COURT: Very well.

8 Q. (BY MR. BRAGG) Ms. Jack, I'm handing you what's  
9 been marked as State's Exhibit 1. Do you recognize what  
10 this is?

11 A. I do.

12 Q. Is it a photocopy of the card that you received  
13 from Mr. and Mrs. Cherry?

14 A. It is.

15 Q. Is it a true and correct copy of that card?

16 A. It is. Well, the first page is the envelope.  
17 The second page is the back of the -- front of the card,  
18 excuse me. And the second -- or the third page would be  
19 the interior of the card that we received.

20 MR. BRAGG: Okay. Your Honor, at this time  
21 I'd seek to admit State's Exhibit 1.

22 MR. WARE: I don't have any objection, Your  
23 Honor.

24 THE COURT: State's Exhibit 1 is admitted  
25 for purposes of this hearing.

1 MR. BRAGG: Thank you, Your Honor.

2 Q. (BY MR. BRAGG) Ms. Jack, if you can, I'd like  
3 for you to read the card.

4 MR. WARE: I would object. The Court can  
5 read the card.

6 THE COURT: I have it right in front of me.

7 MR. BRAGG: That's fine, Your Honor. What  
8 I'd like to do is then just publish the card for the  
9 record.

10 THE COURT: Well, it's already an exhibit.

11 MR. BRAGG: It is.

12 MR. WARE: It is published.

13 THE COURT: Do you have a specific  
14 objection to her just reading it? I mean, you're right, I  
15 can read it. I guess I'm the one that needs to know.

16 MR. WARE: There's no jury here, Your  
17 Honor.

18 THE COURT: I know.

19 MR. BRAGG: Okay. That's fine, Your Honor.  
20 I'll just ask her specific questions in sentences.

21 THE COURT: Thank you.

22 MR. BRAGG: Thank you, Your Honor.

23 MR. WARE: Your Honor, we'll stipulate that  
24 the Cherrys were very gracious, that the Cherrys were very  
25 grateful that this -- that Paul Storey was prosecuted.

1 We'll stipulate that certainly at the time they were very  
2 fond of Christy. But I really don't see the point in  
3 wallowing in this right now. And I object.

4 MR. BRAGG: Your Honor, I'm simply -- there  
5 are statements in this card that I believe are important  
6 not just to what Mr. -- I mean, when the Cherrys are here,  
7 I fully intend to ask them about the card. But I would  
8 also like to know in Christy's mind what did this card say  
9 to her. There are very specific statements here. I want  
10 to know what they said to her.

11 MR. WARE: It doesn't matter because the  
12 card is afterwards. What matters is what was in her mind  
13 when she gave this outside-the-record, illegal argument  
14 that was not even true.

15 MR. BRAGG: I would argue, Your Honor, that  
16 it goes to what Christy's state of mind was at the time  
17 that she made the argument showing that, in fact, her  
18 mindset at the time that she made the argument, she had  
19 even evidence afterwards that showed her that that mindset  
20 was, in fact, correct.

21 THE COURT: I'm going to overrule the  
22 objection and allow the State to develop the record for  
23 purposes of this hearing.

24 MR. BRAGG: Thank you, Your Honor.

25 Q. (BY MR. BRAGG) So in this card, I believe it's

1 the second sentence here, they write: We were genuinely  
2 impressed by your professionalism and competence, some of  
3 it was masterful. Is that correct?

4 A. That's correct. Well, that's correct that  
5 that's what they said. I don't know if it really was  
6 masterful.

7 Q. But that is indeed what they wrote.

8 The very next sentence says: We felt like  
9 we had someone who could speak on Jonas' and our behalfs  
10 (sic). Is that correct?

11 A. That is correct.

12 Q. And then the last sentence there, I guess really  
13 second to last sentence: Lastly, though it was difficult  
14 to go through the trial, we were also very comforted by  
15 some of what we learned. Is that stated there?

16 A. It is.

17 Q. And "very" is underlined twice?

18 A. And I would also add that they also appreciated  
19 the attention to the family during the process.

20 Q. Thank you.

21 And just to clarify, it is signed down  
22 there both Judy and Glenn?

23 A. Yes.

24 Q. So then I would ask to you what -- again, you  
25 are not -- and I'm going to assume that it might Judy



1 writing this, although it could have been Glenn. But  
2 whoever wrote this, you aren't that person, but I want to  
3 know what this card means to you.

4 A. This card embodies --

5 MR. WARE: What this card means to her  
6 after the trial, Your Honor, is irrelevant and is  
7 self-serving.

8 MR. BRAGG: Again, Your Honor, I would just  
9 simply say it goes to her mindset at the time that she was  
10 making the argument because we think that it will show  
11 that her mindset at the time she made the argument, that  
12 she had even evidence after the argument, weeks later  
13 even, that bolstered her thought process.

14 THE COURT: I'm going to overrule the  
15 objection at this time and permit the development of the  
16 record.

17 MR. BRAGG: Thank you.

18 THE WITNESS: This card embodied what I  
19 took to be the Cherrys' position about the trial, about  
20 any questions that they may have had, that they were all  
21 answered, that I was there for them, and that I truly was  
22 echoing or expressing their sentiment when she said, and  
23 thank you, we felt like we had someone who could speak on  
24 Jonas' and our behalfts(sic). If I was not speaking on  
25 their behalf, if I was uttering a sentence that was not

1     their wishes or inconsistent with their behavior, I can't  
2     imagine they would have written that in the card.

3                     And by the same token, Mrs. Cherry --  
4     Dr. Cherry, excuse me, is a psychiatrist. She is not an  
5     unsophisticated woman nor is she uneducated. She  
6     understands that words have a meaning, and she chose the  
7     term "professional." I mean, she understands ethics and  
8     professionalism, and what she wrote in there is that she  
9     thanked us for our professionalism.

10                    If we had said something that was  
11     contradictory to what they had said or what they had  
12     believed or what they had led us to believe, I don't  
13     believe she would have chosen that word.

14             Q.     (BY MR. BRAGG) Now, regarding what they  
15     believed, and I do want to clarify this because I think  
16     this is -- this might even be a little difficult to  
17     understand, but I want to make sure we're clear here.

18                    Your contention is not that they went from  
19     being generally opposed to the death penalty and then  
20     generally in favor of the death penalty in all cases?

21             A.     That's correct.

22             Q.     Your contention then is what, when you talk  
23     about kind of the shift of the curve, what would you say  
24     that shift is?

25             A.     This specific case and these specific

1 circumstances surrounding their son's execution and the  
2 punishment phase that they witnessed as well.

3 Q. Including the fact that Paul Storey had the  
4 opportunity for life --

5 A. Including the fact -- I'm sorry, I didn't mean  
6 to --

7 Q. Go ahead.

8 A. Including the fact that both Paul Storey and  
9 Mark Porter had the opportunity to accept a life sentence.

10 Q. And chose not to?

11 A. And chose not to.

12 Q. At least Paul Storey chose not to.

13 A. Right. Right.

14 And at the time that this card was sent,  
15 this card would have been sent, as best I can tell, after  
16 Mark Porter accepted his life sentence. And there's  
17 nothing in this card to indicate we never knew life was on  
18 table. We never knew a life sentence was offered. Why  
19 wasn't Paul Storey given the same opportunity that Mark  
20 Porter was given. So I think this card is important  
21 because it's not only what it says but what it does not  
22 say.

23 Q. You executed an affidavit or at least there's an  
24 affidavit that you signed that is attached to the writ,  
25 you're aware of that?

1           A.     I am. The affidavit was prepared, though, in  
2 connection as what was represented to me for clemency  
3 purposes.

4           Q.     How -- how were you approached to execute the  
5 affidavit?

6           A.     A friend of mine by the name of Joetta Keene  
7 approached me.

8           Q.     And this was the same Joetta Keene that you are  
9 currently co-counsel with?

10          A.     Same Joetta Keene that I am currently co-counsel  
11 on two capital murder cases.

12          Q.     And just for -- to help out the court reporter,  
13 could you spell Joetta Keene?

14          A.     I think it's J-O-E-T-T-A, and I believe it's  
15 K-E-E-N-E.

16          Q.     Were you aware that the subsequent writ was  
17 being prepared at the time of clemency or, you know, I  
18 don't know that it was, but were you aware -- did they  
19 discuss at all with you the fact that they were preparing  
20 a subsequent writ?

21          A.     No.

22          Q.     Were you asked any questions about these facts  
23 at that time, at the time you executed the affidavit?

24          A.     Initially, no. The affidavit was for clemency  
25 purposes. Joetta had indicated that the Cherrys now no

1 longer wanted him to be put to death. And I was and I am  
2 fond of the Cherrys, and I feel badly for them. And I  
3 executed an affidavit at her request.

4 And at some point, the conversation turned  
5 to -- I remember asking her, is there some writ, and she  
6 really didn't know much about it. And I had a subsequent  
7 conversation with Mike Ware having to do with my  
8 affidavit. I certainly didn't execute this affidavit for  
9 purposes of the writ. Let's put it that way. And that's  
10 not what I was told it was going to be used for.

11 Q. Now, when opposing counsel is asking you  
12 about -- basically asking for your opinion as to the  
13 character of various attorneys, I believe there's one  
14 attorney that they did not ask about, and that was your  
15 co-counsel in this case. How many -- you had tried cases  
16 with Robert Foran before? Or you at least tried cases  
17 with Robert Foran in addition to this case?

18 A. I actually think this is the one and only case  
19 we ever tried together.

20 Q. But you worked together?

21 A. Yes.

22 Q. How many years did y'all work together at the  
23 office -- at the district attorney's office?

24 A. He left before I did, and he retired or  
25 resigned, would have been December of 2014. And so we

1 would have worked together almost 24 years -- well, in the  
2 same office. I can't say that we always worked together  
3 in the same court, that type of thing.

4 Q. Sure. Did you believe Robert to be an honest  
5 attorney?

6 A. Yes.

7 Q. Did you believe him to be a forthright attorney?

8 A. Yes.

9 Q. Did you believe him to seek justice in cases?

10 A. Yes.

11 Q. And that doesn't just mean that -- justice does  
12 not mean a conviction, does it?

13 A. No.

14 Q. Justice means the right result?

15 A. Robert and I have both been confronted with  
16 difficult situations from time to time, sometimes having  
17 to dismiss cases as serious as a capital murder.

18 Q. I'd actually like to ask you a follow-up  
19 question to that. During your prosecutorial career, apart  
20 from capital cases, because I believe you did testify on  
21 direct that this was kind of separate and apart from any  
22 other situation you'd encountered, correct, where some  
23 members of the victim's family were opposed to the death  
24 penalty?

25 A. Right.

1           Q.     But you certainly had other cases as a  
2     prosecutor where -- that either the victim themselves or  
3     the victim's family was not in favor of pursuing guilt or  
4     not in favor of seeking a stronger punishment?

5           A.     That's correct.

6           Q.     How have you dealt with that in those  
7     situations?

8           A.     We've disclosed it to the Defense in each case.  
9     Domestic violence cases, prime example of a case where  
10    most victims do not want to cooperate with nor do they  
11    want to prosecute the offender.

12                   I spent a number of years in crimes against  
13    children and many of those cases involved mothers of  
14    victims who did not want to see their boyfriend, husband,  
15    paramour prosecuted. There were also cases where the  
16    victims themselves, they were children, and they did not  
17    want to see their parents prosecuted. In each of those  
18    cases I disclosed that evidence to the opposing counsel.

19                   MR. BRAGG: No further questions, Your  
20    Honor. Pass the witness.

21                   THE COURT: Any other questions from the  
22    Applicant at this time?

23                   REDIRECT EXAMINATION

24           BY MR. WARE:

25           Q.     Christy, I believe the conversation you and I

1 had about the affidavit, and we were talking about  
2 clemency, I remember you asked me, well, I'm not going to  
3 give -- or something like, are you going to come after me  
4 at some point? You asked me something such as that. Do  
5 you recall that?

6 A. I said, Mike, are you getting ready to allege  
7 some kind of misconduct?

8 Q. Well, maybe that's what you said, something like  
9 that. And my answer was, I probably will before this is  
10 all over with. You remember that? You said, I appreciate  
11 your honesty.

12 A. That was not your answer.

13 Q. Okay. Well, that was my answer.

14 Well, let me ask you this. This affidavit  
15 which was used in the clemency, but as I assume has been  
16 explained to you, that won't be decided until the judicial  
17 proceeding is decided. Is there something you want to  
18 change in that affidavit?

19 A. No.

20 Q. Okay. So sometime during jury selection, I  
21 believe your testimony is that somehow it's disclosed to  
22 Larry and Bill that the Cherrys are against the death  
23 penalty, that Mr. and Mrs. Cherry, Jonas Cherry's parents  
24 are against the death penalty, correct?

25 A. I think it was disclosed prior to jury



1 selection, prior to --

2 Q. Okay. But you were there when it was talked  
3 about?

4 A. Talked about, yes, I'm sorry. You said  
5 disclose. I have a different meaning of the word  
6 "disclose."

7 Q. And Larry and Bill, did they say: Wait a  
8 minute, you're telling me the victim's parents are opposed  
9 to the death penalty but y'all are going forward with  
10 death anyway?

11 A. No, they did not.

12 Q. There was no discussion like that?

13 A. No.

14 Q. There was no discussion like: Well, waive the  
15 death penalty. If the parents are against the death  
16 penalty, this is craziness. Why are y'all going forward  
17 with the death penalty when the parents are against the  
18 death penalty? There was no discussion like that?

19 A. No.

20 Q. Did Larry or Bill go: I've never heard of such  
21 a situation. This is going to be the talk of the  
22 courthouse, that the State's going forward with a death  
23 penalty case when the parents are clearly against the  
24 death penalty?

25 A. No.

1           Q.     Did they say: Do you mind if we go talk to  
2     Levy, since you don't want to talk to them, do you mind if  
3     we go talk to Levy and Curry and make sure that they're  
4     aware of this outrageous situation where the State is  
5     seeking the death penalty and the parents don't want the  
6     death penalty? That never came up?

7           A.     No.

8           Q.     Now, you knew the Cherrys before all this, we  
9     talked about that. You knew -- you were acquainted with  
10    them?

11          A.     That's correct.

12          Q.     Okay. And you knew them to be intelligent,  
13    thoughtful people?

14          A.     Yes.

15          Q.     You didn't -- you didn't know before this, you  
16    didn't know they were against the death penalty, or did  
17    you, before this murder?

18          A.     No, I had no idea.

19          Q.     Okay. I mean, they're not somebody that's  
20    parading it around everywhere, they just were against the  
21    death penalty?

22          A.     Let me back up. When I say acquaintances, I  
23    only recall having met Glenn. I might have met Judy  
24    before then. But my recollection -- I mean, I can see  
25    Glenn at their shrubs between our houses, and that's where

1 I would talk to him because we had adjoining driveways.  
2 And so I remember that. I don't really remember many  
3 conversations, if any, at all with Judy.

4 Q. Okay.

5 A. And so when I say, I mean --

6 Q. I gotcha. Glenn is a nice man?

7 A. Very nice man.

8 Q. Soft spoken?

9 A. Uh-huh.

10 Q. Thoughtful?

11 A. Yes.

12 Q. And, of course, Judy is a professional, as you  
13 say, a psychiatrist in a women's prison, correct?

14 A. I think she's the head -- if I'm not mistaken, I  
15 think she's the head psychiatrist for the federal bureau  
16 of women's prison. I may have --

17 Q. During this when you found out they were opposed  
18 to the death penalty, it didn't really -- I mean, you'd  
19 never thought about it before, but it didn't really  
20 surprise you, did it?

21 A. Did it surprise me that?

22 Q. That they were the sort of people that would be  
23 opposed to the death penalty.

24 A. I don't know that I really thought about it.

25 Q. Okay.

1           A.     Whether I would be surprised or not.

2           Q.     Okay. But it wasn't the sort of thing where you  
3 went, did not see that coming. You just -- you kind of  
4 took it in stride, I guess?

5           A.     Uh-huh. Yes, I'm sorry.

6           Q.     But it was very clear that they were opposed to  
7 the death penalty?

8           A.     That they were -- they had a general opposition  
9 to the death penalty.

10          Q.     Well, I mean, have you read where they had also  
11 said that they don't want Paul Storey's mother to go  
12 through this?

13          A.     Yes.

14          Q.     And that would be particular to this case,  
15 wouldn't it?

16          A.     Yes.

17          Q.     That's not just generally against but it's this  
18 case as well?

19          A.     I'm sorry, I thought you were asking me about  
20 years ago.

21          Q.     And so you liked them, they liked you. And, of  
22 course, this was a very vulnerable time in their life, was  
23 it not?

24          A.     I can only imagine.

25          Q.     Yeah, I can only imagine too.

1                   And they were very dependent on you and  
2 Robert, probably you more than Robert to sort of guide  
3 them through this strange system up here that we call the  
4 criminal justice system, right?

5           A.     Yes.

6           Q.     And once again, they're not complainers, they're  
7 the kind of people who are grateful for every act of  
8 kindness shown them, correct?

9           A.     I can't really speak to that. I can only speak  
10 to my relationship with them.

11          Q.     Okay. Well, you've probably had victims or  
12 victims' families that were a lot of trouble or very  
13 demanding or very needy or whatever, and they didn't fit  
14 into that category?

15          A.     No, they did not.

16          Q.     And they were gung ho about this case being  
17 prosecuted. And they were gung ho -- they never made any  
18 bones about how they wanted both Paul Storey and Mark  
19 Porter locked up without any possibility of ever getting  
20 out of prison. They were very firm on that, were they  
21 not?

22          A.     I think that probably their concern came in in  
23 listening as well to Larry Fitzgerald's testimony about if  
24 Mark Porter and Paul Storey were given a life sentence,  
25 where they would be in prison and that they would be in

1 general population. And so I think they learned that it's  
2 not as secure as the Defense wanted the jury to believe.

3 MR. WARE: Well, let me object to that as  
4 unresponsive and let me see if I can get you to answer my  
5 question.

6 Q. (BY MR. WARE) They were very -- they never  
7 wavered. They didn't come in saying, uh, you know, they  
8 were very firm that they wanted him prosecuted. They  
9 wanted both of them prosecuted, and they wanted both of  
10 them to serve the rest of their lives in prison. They  
11 didn't waiver at all about that, correct?

12 A. I think that's a fair statement.

13 Q. But they were against the death penalty?

14 A. Yes.

15 Q. And in all fairness, there is a difference  
16 between life and death, is there not?

17 A. Of course there is.

18 Q. A huge difference, correct?

19 A. Yes.

20 Q. Okay. So for them, there's nothing really  
21 inconsistent with them being all gung ho for the  
22 prosecution and being very much in favor of and grateful  
23 to you for being part of the prosecution and being in  
24 favor of Paul Storey being locked up in prison for the  
25 rest of his life, there's nothing inconsistent with any of

1     that while at the same time philosophically, spiritually,  
2     ethically being against the death penalty.  There's  
3     nothing inconsistent there, is there?

4           A.     No.

5           Q.     Now, if what you have testified to here under  
6     oath is true, Glenn Cherry at least had this  
7     transformation that he communicated I guess to you and  
8     Robert as you related after the close of punishment  
9     evidence, correct?

10          A.     Well, it wouldn't have been after the close.  
11     Both sides had not closed.

12          Q.     Okay.  But you were about to?

13          A.     I think it was after the conclusion of the  
14     Defense case.

15          Q.     Okay.  And so I guess -- I mean, obviously, if  
16     what you say is true, what you've testified to here under  
17     oath about that conversation, and that's what you relied  
18     on in making your argument that we talked about; is that  
19     correct?

20          A.     Yes.

21          Q.     The argument was still outside the record,  
22     correct?

23          A.     Yes.

24          Q.     And assuming for a moment that it is improper  
25     for the State to put on evidence or information about how

1 the victim's family feels about the death penalty,  
2 assuming that that's correct, that information was -- that  
3 information shouldn't have been put before the jury in the  
4 matter of an argument either, should it?

5 A. Well, I think in argument there's a little bit  
6 -- I mean, I would agree it's outside the record and it's  
7 an argument that should not have been made.

8 Q. Okay. Thank you.

9 And that's even if it's true, even if it  
10 was true what you argued, correct?

11 A. It was true, Mike.

12 Q. Well, even if it was true, it's still improper,  
13 correct?

14 A. Yes.

15 Q. Okay. So -- but you understand that Glenn and  
16 Judith Cherry now say that it was not true. You  
17 understand that, correct?

18 A. I don't know what they say now.

19 Q. Okay. Well, is it your position that from the  
20 time -- you understand that they're against the death  
21 penalty now, correct?

22 A. I understand that they do not want to see Paul  
23 Storey executed for their son's murder.

24 Q. So is it your position that they were against  
25 the death penalty, then they were for the death penalty,



1 and now they're against the death penalty again?

2 A. I don't think it's quite as black and white as  
3 you're laying out, but generally, yes.

4 Q. So you said -- do you remember saying this to  
5 the Star-Telegram: Jack says she understands if the  
6 parents have changed their minds about the death penalty  
7 over time and would support whatever decision is made  
8 regarding Storey. Do you remember saying that?

9 A. I did.

10 Q. And so what you're saying there is they must  
11 have changed their minds, they must have -- you know, for  
12 the last time you talked to them, they were for the death  
13 penalty and they must have changed their minds?

14 A. That's right.

15 Q. Would it surprise you to know that that  
16 statement they read in the paper made them very angry?

17 A. I have not talked to them in probably -- well,  
18 since the trial. So I wouldn't know how they reacted to  
19 it.

20 Q. If they say that's not true at all, would that  
21 surprise you?

22 A. That would surprise me.

23 Q. They -- and I believe they've said this in their  
24 video. Have you seen the video?

25 A. I have.

1           Q.     I believe it says in the video and on their  
2     letter they were never told that Paul Storey was ever  
3     offered a life sentence.

4                     MR. BRAGG:  At this point, Your Honor, we'd  
5     object that we're now talking about stuff that isn't a  
6     part of the record of this hearing.

7                     THE COURT:  Any response to that?

8                     MR. WARE:  Your Honor, she said she's seen  
9     the video and I want to get her reaction to it.

10                    THE COURT:  Well, I'll permit it for  
11    purposes of developing a record.  We'll see -- I'll have  
12    to weigh all this eventually, anyway.  So I'm going to go  
13    ahead and allow it.

14            Q.     (BY MR. WARE)  Are they, likewise, inaccurate or  
15    untruthful about that, that they were never told Paul  
16    Storey was offered a life sentence?

17            A.     I would never say that they are intentionally  
18    being deceitful.  I don't know if they're misremembering.  
19    I don't know if they're mistaken.  I don't know if they  
20    feel guilty over time.  I don't know the reasons behind  
21    why they're saying what they're saying.

22            Q.     Do you know if they even heard your argument?

23            A.     I don't know how they could not hear my argument  
24    because they were very close.

25            Q.     Were you yelling it out?

1           A.     Were they --

2           Q.     Were you yelling it out?

3           A.     I don't know the volume. But, I mean, I  
4 certainly wasn't -- it was loud enough for the entire jury  
5 to hear.

6           Q.     And you said that they never came up to you  
7 afterwards and chided you for that argument or ever  
8 brought it up specifically, I guess.

9                     What about -- what about your co-counsel or  
10 Larry or Bill in particular, did they ever come up -- I  
11 know they didn't object in trial, but they thought the  
12 Cherrys were still against the death penalty. So when you  
13 made that argument, if you disclosed to them as you  
14 testified to under oath several times that the Cherrys  
15 were against the death penalty, they never came up to you  
16 and said, what was -- what was with that argument? The  
17 whole deal here is the Cherrys are against the death  
18 penalty and you just argued the opposite. And then you  
19 had the opportunity to go, well, guess what, Glenn Cherry  
20 just told me. That never happened?

21          A.     That never happened.

22          Q.     And you're saying that the reason that -- the  
23 reason they didn't object at trial and the reason that  
24 never happened, you're saying that you have no idea why,  
25 because they knew -- they knew the Cherrys were against

1 the death penalty?

2 A. I do not know why they did not object.

3 Q. Or why they confronted you afterwards -- or why  
4 they didn't confront you afterwards. I mean, normally in  
5 most cases that would be true, wouldn't it? Normally in  
6 most cases, probably the victim's family and everyone who  
7 loved them might be for the death penalty. I mean, that  
8 wouldn't be an unusual situation, right? That a victim's  
9 family would be for the death penalty?

10 A. That's correct.

11 Q. What was extraordinary about this case is that  
12 the victim's family felt the opposite, they were against  
13 the death penalty. That was what was unusual and  
14 extraordinary about this case, right?

15 A. Well, not the widow.

16 Q. Okay. But I'm talking about the parents.

17 A. Okay.

18 Q. I mean -- I mean, Jonas was their only child,  
19 right?

20 A. He was their only child, yes.

21 Q. So I guess what you're saying is the reason it's  
22 coming up now is because -- not because they felt opposed  
23 to the death penalty before the murder, they felt they  
24 were opposed to the death penalty during the proceeding,  
25 and they are opposed to the death penalty now and have

1 always been opposed to the death penalty. What you're  
2 saying is, the reason it's coming up now is because they  
3 were against it, then they were for it, and now they're  
4 against it again, and so they've wavered?

5 MR. BRAGG: Objection, Your Honor. She's  
6 already said that she hadn't spoken to them in years. She  
7 doesn't know why, as he says, this is coming up now.

8 THE COURT: I think you may have already  
9 developed that with her.

10 MR. WARE: Okay. Your Honor, I'll move on.

11 Q. (BY MR. WARE) So do you know at what point the  
12 Cherrys changed their mind? Do you have any idea?

13 A. No.

14 Q. So if, in fact, what you're saying is true -- in  
15 fact, at the time -- I mean, assuming for the moment that  
16 what you've testified to here under oath, that the Cherrys  
17 actually transformed to in favor of the death penalty in  
18 this case, in fact, if say Bob Ford had gone and talked to  
19 them, according to what you say, at that point they may  
20 have still been for the death penalty; is that correct?

21 A. I have no idea.

22 Q. Okay. So let me ask you this. If, in fact,  
23 there's an offer of life in a death penalty case and if  
24 it's turned down for whatever reason by the defendant, or  
25 by counsel, anyway if it's rejected, you agree that, in

1 fact, there's virtually no reason to go talk to the family  
2 of the victim?

3 A. You mean if you're a defense attorney or  
4 prosecutor?

5 Q. Defense attorney, yes.

6 A. No, I wouldn't agree with that.

7 Q. You as a regular habit go talk to the victim's  
8 family in a death penalty case?

9 A. I've not tried one for the death penalty, no.

10 Q. So you've never done it?

11 A. No, but I have done it on a serious case, but it  
12 was not a capital murder case.

13 Q. Did you at any point tell counsel that the  
14 family didn't want to talk to them, didn't want to talk to  
15 defense counsel?

16 A. I did not.

17 Q. Or might have Robert?

18 A. He might have. I did not.

19 Q. You would agree that there certainly would be  
20 some risk in defense counsel going and talking to the  
21 family of the victim in a murder case such as this?

22 A. I don't think there's any risk to it, no.

23 Q. Okay. So you don't think there's a chance that  
24 it would antagonize them or offend them or anything along  
25 those lines?

1           A.     I think it depends on how you handle the family.  
2     And I think if you take an investigator with you as an  
3     independent witness, then, no, I don't think there's a  
4     risk.

5           Q.     Okay.   So --

6           A.     In fact, I don't even know if it was around that  
7     time, the defense initiated victim outreach program.   I  
8     don't know when that came into being.   But that is  
9     specifically for or designed for someone to approach  
10    victims' families, as I understand it.

11          Q.     Okay.   But you've never tried a death penalty  
12    case as a defense lawyer?

13          A.     No, I have not.

14          Q.     You wouldn't fault a death penalty defense  
15    lawyer in a particular case for not seeking to talk to the  
16    victim's parents?

17          A.     I would have if I were a defense attorney.   If I  
18    tried a death penalty case, if that ever happens, then I  
19    would endeavor to talk to the family members.

20          Q.     Did you endeavor to facilitate that in this  
21    case?

22          A.     Did I endeavor to facilitate it?

23          Q.     Yeah, the Defense talking to the family.

24          A.     No.   I don't know that they ever approached me  
25    about talking to Suman or the parents.

1 Q. Do you know whether they would have talked to  
2 defense counsel if they'd approached them?

3 A. They're very nice people. I have no reason to  
4 think they wouldn't, but I don't know that for a fact.

5 And I can also tell you, Mike, that in the  
6 past if --

7 Q. So let me ask you, so are you saying that you  
8 are faulting Larry Moore and Bill Ray and Bob Ford and  
9 Mark Daniel and Tim Moore, you are faulting them, are you  
10 saying you are faulting them for never talking to Mr. and  
11 Mrs. Cherry?

12 A. I'm saying I don't know their reasons for not  
13 contacting them.

14 Q. That wasn't my question. Are you faulting them  
15 for not doing it?

16 A. I don't know their reasons for not doing it.  
17 They might --

18 Q. I know you don't know the reasons. But are you  
19 faulting them for not doing it?

20 A. I don't think it's mine to place fault on them.

21 Q. So you're not faulting them for not doing it?

22 MR. BRAGG: Objection, Your Honor, it's  
23 been asked and answered.

24 MR. WARE: Well, it's been asked and --

25 THE COURT: I'll allow the response to the



1 last question if she has one.

2 Q. (BY MR. WARE) Are you faulting them or are you  
3 not faulting them for not talking to the Cherry family,  
4 the -- Jonas Cherry's parents, for not seeking them out,  
5 banging on their door, and talking to -- and seeking to  
6 talk to Jonas Cherry's parents?

7 A. I am not faulting them.

8 Q. Thank you.

9 A. I do not know their reasons why they did not  
10 contact them.

11 Q. I take it that you still stand by your affidavit  
12 and you would have no objection to the governor commuting  
13 Paul Storey's sentence to life in the penitentiary without  
14 the possibility of parole?

15 MR. BRAGG: Objection, Your Honor,  
16 relevance.

17 MR. WARE: Well, she's gone in and even  
18 implied there's something improper about that.

19 MR. BRAGG: She didn't imply any such  
20 thing, Your Honor.

21 THE COURT: Well, it's irrelevant to this  
22 proceeding. I know clemency is a different issue.

23 MR. HAMPTON: This is the reason it's  
24 relevant. It's not exactly to this proceeding but it is  
25 to the other motion that was made at the beginning of the

1 hearing, which is a -- in other words, if everybody in  
2 Tarrant County is fine with commuting the death sentence  
3 to life, then why can't we do that.

4 And that goes to the motion stated earlier  
5 about the dis-- about your ability to appoint an attorney  
6 pro tem from Tarrant County to make a decision that would  
7 be unanimously supported by every character involved in  
8 this case except for the Attorney General's Office.

9 MR. BRAGG: And, Your Honor, that right  
10 there he just stated it goes to clemency. This is not a  
11 clemency proceeding. The CCA gave us a very -- they gave  
12 us five merit determinations and a procedural issue to  
13 deal with and that's it. Not Ms. Jack --

14 MR. HAMPTON: Judge, you have much greater  
15 authority than that. You're able to appoint people if you  
16 want or not, and that motion is there. And, you know, if  
17 you have the very prosecutor who first offered life, then  
18 successfully got death in a position to tell the governor,  
19 being one of the officials to commute a death to life, you  
20 might be persuaded to grant our request. And that's the  
21 relevancy of it.

22 THE COURT: Well, I understand your purpose  
23 of bringing it up. I don't think it's relevant to what  
24 we're doing. I don't think it's relevant to what the  
25 Court of Criminal Appeals asked to be determined.

1                   But she's acknowledged already making the  
2 affidavit. I'm going to sustain the objection at this  
3 time, but I think she's given an affidavit. I think  
4 that's clear.

5                   MR. WARE: Can we get the answer for the  
6 record?

7                   THE COURT: I may not consider it, but I  
8 will allow the answer just so it's out there. But I may  
9 not consider it relevant.

10                  MR. BRAGG: But just to be clear, Your  
11 Honor, now this is an offer like a bill of exception. You  
12 have sustained the objection.

13                  THE COURT: I sustained the objection. If  
14 you want to develop what it would be, you may do so.

15                  Q. (BY MR. WARE) Do you remember the question?

16                  A. No. I know it had to do with my affidavit.

17                  Q. Yeah.

18                  A. And I think what you were asking me was, did I  
19 -- I would have no objection to him receiving a life  
20 sentence, and I think what my affidavit said was that I  
21 was sympathetic to the Cherrys' feelings and would respect  
22 whatever decision Governor Abbott deems appropriate.

23                  Q. And you stand by that?

24                  A. I do stand by that.

25                  Q. And would you be willing to talk to the

1 governor?

2 A. Yes, I would.

3 Q. Thank you.

4 THE COURT: All right. Additional  
5 questions from the State then?

6 MR. BRAGG: No further questions, Your  
7 Honor.

8 THE COURT: All right. I'm sure that y'all  
9 may want to keep her on call if necessary.

10 MR. WARE: Yes, Your Honor.

11 THE COURT: Any issue with her going about  
12 her way at this time?

13 MR. WARE: No, Your Honor.

14 THE COURT: Well, you may step down at this  
15 time.

16 MR. WARE: We'd ask that she be reminded  
17 she's under the rule.

18 THE COURT: I was going to say, please  
19 remain available in case you're needed. Remember you're  
20 still under oath and under the rule.

21 THE WITNESS: Thank you.

22 THE COURT: All right. Thank you.

23 (Witness leaves courtroom)

24 THE COURT: Okay. It's 2:45. We've been  
25 proceeding about an hour and a half, or almost I think.

1 So why don't we take a short recess and then get the next  
2 witness lined up. Thank you.

3 (Recess)

4 (Open court, defendant present)

5 THE COURT: Back on the record then. It's  
6 my understanding that counsel has agreed, because of the  
7 next witness' travel schedule, to go ahead and take Bob  
8 Gill out of order; is that correct?

9 MR. OTTOWAY: That is correct, Your Honor.

10 THE COURT: Anything else that needs to be  
11 put on the record besides that?

12 MR. WARE: I don't think so, Your Honor.

13 THE COURT: The State is calling?

14 MR. OTTOWAY: The State as Respondent would  
15 be calling Judge Robert Gill.

16 THE COURT: Let me have you raise your  
17 right hand and be sworn.

18 (Witness sworn)

19 THE COURT: The State may proceed.

20 MR. OTTOWAY: Thank you, Your Honor.

21 ROBERT GILL,  
22 having been first duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. OTTOWAY:

25 Q. Judge Gill, could you state your name for the

1 record, please.

2 A. Robert Gill.

3 Q. And could you tell the Court what your current  
4 profession is?

5 A. I'm a criminal defense attorney in Tarrant  
6 County.

7 Q. Okay. And in September of 2008, how were you  
8 employed?

9 A. I was an assistant criminal district attorney in  
10 Tarrant County.

11 Q. And in that capacity, what was your specific  
12 position within the district attorney's office?

13 A. I was a supervisor over the chief prosecutors  
14 assigned to several of the Tarrant County district courts.  
15 I was what was known as a super chief at the time.

16 Q. And how many -- how many chiefs would you  
17 supervise at any given time?

18 A. Four to seven.

19 Q. And in September of 2008, were you Robert  
20 Foran's direct supervisor?

21 A. I don't recall.

22 Q. Do you recall having any conversations with  
23 Robert Foran about the Paul Storey case?

24 A. I do.

25 Q. And can you tell the Court what that discussion

1 was?

2 A. The way I remember it, late one day, late one  
3 afternoon Mr. Foran came to me -- or he and I met out in  
4 the hallway, actually. I think he was in jury selection  
5 at the time. And we had a discussion about whether or not  
6 he should give the Defense some information regarding the  
7 victim's family's stance on the death penalty.

8 Q. And just so that we're clear, this is the victim  
9 of Paul Storey -- or the parents of the victim in the Paul  
10 Storey case?

11 A. Correct.

12 Q. And that discussion, do you recall what you said  
13 to Mr. Foran?

14 A. I told him that he ought to inform the Defense  
15 about it.

16 Q. Okay. And did you have any other discussions  
17 with Mr. Foran about the Paul Storey case at all besides  
18 that discussion?

19 A. No, I did not.

20 Q. Do you know whether he disclosed the position of  
21 the parents?

22 A. All I know is that it was his inclination to do  
23 that, and he was kind of using me to verify that he was  
24 doing the right thing.

25 Q. Did you have any other discussion about the

1 Storey case with Mr. Foran?

2 A. I don't recall having any other discussion.

3 Q. Do you recall having any discussion with Christy  
4 Jack?

5 A. No.

6 Q. Did you have any other interaction with the Paul  
7 Storey case?

8 A. No.

9 MR. OTTOWAY: Nothing further, Your Honor.

10 THE COURT: Defense may cross-examine the  
11 witness then at this time.

12 MR. WARE: Sure.

13 CROSS-EXAMINATION

14 BY MR. WARE:

15 Q. Bob, we've known each other a long time; is that  
16 correct?

17 A. Correct.

18 Q. You don't mind if I don't call you judge, do  
19 you?

20 A. That's fine. I'm kind of stuck up here.

21 Q. What's that?

22 A. I'm kind of stuck up here. I have to answer  
23 your questions no matter what you call me.

24 Q. So I think you said you had this discussion with  
25 Robert Foran, but you have no idea what he did with what



1       you told him he should do, correct?

2           A.       Correct.

3           Q.       He may have disclosed it, he may not have  
4       disclosed it?

5                   MR. OTTOWAY:   Speculative, Your Honor.

6                   MR. WARE:   How is that speculation?

7                   THE COURT:   I'll sustain that objection.

8           Q.       (BY MR. WARE)   Well, you know -- you don't know  
9       that he did disclose it?

10                   MR. OTTOWAY:   Your Honor, he answered that.  
11       He doesn't know what Mr. Foran did.

12                   THE COURT:   Well, I'm going to allow -- go  
13       ahead and allow the question and answer.

14                   THE WITNESS:   I don't know what he did with  
15       it.

16           Q.       (BY MR. WARE)   Okay.

17           A.       Or didn't do with it.

18           Q.       Okay.   Do you know -- could the date have been  
19       even earlier than that or do you know?

20           A.       All I know is it was sometime after July 1<sup>st</sup>  
21       of 2008.

22           Q.       Because you were -- that's when you came back to  
23       the office; is that correct?

24           A.       That's correct.

25           Q.       Now, they suggested September.   Is that

1 something they suggested or is that something that -- that  
2 you think it was September?

3 A. I don't know when it was. All I know is it was  
4 after July 1<sup>st</sup> of 2008. I don't know specifically what  
5 day of the week or what month it was.

6 Q. Okay. Could have been July 2<sup>nd</sup>?

7 A. Could have been. Could have been July 1<sup>st</sup>.

8 Q. Okay. But I assume from the tenor of the  
9 conversation that at least at that point, whenever it was,  
10 the information that the Cherrys -- the information as you  
11 understood it was that the victim's parents were against  
12 the death penalty, correct?

13 A. Somebody in the family was against the death  
14 penalty or didn't believe in the death penalty or  
15 something to that effect.

16 Q. Okay. Somebody close -- some close family  
17 member?

18 A. Yes.

19 Q. Okay. And he obviously had enough question  
20 about it that he asked you or talked to you about it?

21 MR. OTTOWAY: Speculation, Your Honor.

22 THE COURT: Well, I'm going to overrule the  
23 objection and allow a response.

24 THE WITNESS: My recollection was that his  
25 inclination was to turn it over and he was just verifying

1       that I thought he would be doing the right thing if he did  
2       that.

3           Q.     (BY MR. WARE)   Do you know who the defense  
4       attorneys were?

5           A.     No.

6           Q.     Do you know Larry Moore?

7           A.     I do.

8           Q.     Okay.   Is Larry Moore a very competent attorney?

9           A.     Very.

10          Q.     Very honest attorney?

11          A.     Yes, sir.

12          Q.     Very honest person?

13          A.     Yes.

14          Q.     A lot of integrity?

15          A.     Yes.

16          Q.     Very diligent?

17          A.     I think so.

18          Q.     Bill Ray was the other attorney, you know him?

19          A.     I know Bill.

20          Q.     Would you say all the same things about Bill  
21       Ray?

22          A.     Yes, sir.

23          Q.     Bob Ford was the writ attorney, the state writ  
24       attorney.   Would you say the same things about Bob Ford?

25          A.     Yes.

1 Q. Tenacious?

2 A. Yes.

3 Q. Diligent?

4 A. Uh-huh. Correct.

5 Q. Okay. Did Robert Foran indicate he had asked  
6 anybody else this question about what he should do with  
7 this information that the Cherrys were against the death  
8 penalty?

9 A. I do not recall -- I do not recall discussing  
10 that with him.

11 Q. Did you tell anybody about it?

12 A. Not that I recall.

13 Q. Okay. So why did you think it was proper to  
14 disclose it?

15 A. I thought it might be mitigating. Or at least  
16 it's a close enough call that, in my opinion, you just  
17 turn it over and be done with it.

18 Q. Do you -- do you have any idea why Robert Foran  
19 did not list this information in his written Brady  
20 disclosure?

21 MR. OTTOWAY: Be speculative, Your Honor.

22 THE WITNESS: No.

23 MR. WARE: He's already answered, Your  
24 Honor.

25 THE COURT: He has answered.

1 MR. OTTOWAY: Then I would move to strike,  
2 Your Honor.

3 THE COURT: I'm going to overrule that  
4 request.

5 MR. OTTOWAY: I apologize, I did not hear  
6 the answer.

7 THE COURT: Oh, okay. Sometimes you have  
8 to listen out of both ears. He did respond.

9 MR. WARE: The answer is no.

10 MR. OTTOWAY: Thank you.

11 Q. (BY MR. WARE) I mean, you didn't say anything  
12 like, yeah, disclose it but don't put it in writing in  
13 your Brady disclosure. You didn't say anything like that,  
14 did you?

15 A. No.

16 MR. WARE: I'll pass the witness.

17 THE COURT: Any other questions from the  
18 State?

19 MR. OTTOWAY: A few, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. OTTOWAY:

22 Q. When I asked you about September of 2008, did I  
23 ask you whether that disclosure occurred in 2008? I asked  
24 where you were working in September of 2008, correct?

25 A. Correct.

1           Q.     With respect to Christy Jack, do you have an  
2     opinion about her truthfulness?

3           A.     I would have the same opinion of Christy Jack  
4     and Robert Foran that I expressed as to Mr. Moore,  
5     Mr. Ray, and Mr. Ford.

6           Q.     And that would be that they are truthful and  
7     forthright?

8           A.     Correct.

9           Q.     Now, when you say -- or when you said that your  
10    opinion was that they should turn it over, you're not  
11    saying that's a conclusion of law, are you?

12          A.     No.

13          Q.     Just your opinion?

14          A.     My opinion.

15                   MR. OTTOWAY:  Nothing further, Your Honor.

16                   THE COURT:  Any other questions from the  
17    Defense or the Applicant?

18                                RE CROSS-EXAMINATION

19    BY MR. WARE:

20          Q.     If it was something that needed to be disclosed  
21    to the Defense, would it also go without saying that if it  
22    needs to be disclosed, it should have been disclosed very  
23    promptly to the Defense at the soonest time?

24                   MR. OTTOWAY:  Your Honor, that's  
25    speculative.

1           Q.    (BY MR. WARE) Well, if it's something that needs  
2 to be disclosed to the Defense such as what we're talking  
3 about, would there be any reason you could think of to  
4 hang on to it for weeks or months before disclosing it?

5                   MR. OTTOWAY: Again, that's speculative,  
6 Your Honor.

7                   THE COURT: Well, I'm going to overrule the  
8 objection, allow the response.

9                   THE WITNESS: It's not something I would  
10 hold on to for weeks or months, but I didn't see it as  
11 anything that was an emergency either.

12           Q.    (BY MR. WARE) So it should have been disclosed  
13 promptly like any other Brady?

14           A.    Yes, sir.

15                   MR. WARE: Pass the witness.

16                   THE COURT: Any other questions?

17                   MR. OTTOWAY: Nothing further, Your Honor.

18                   THE COURT: Is there further need of Judge  
19 Gill from either side?

20                   MR. OTTOWAY: No, Your Honor.

21                   MR. WARE: No, Your Honor.

22                   THE COURT: All right. Then you may step  
23 down and you may go about your way. I understand you have  
24 a trip planned for tomorrow.

25                   THE WITNESS: I do. May I be excused?

1 THE COURT: You may be excused.

2 THE WITNESS: Thank you very much.

3 THE COURT: Off-the-record discussion.

4 (Discussion off the record)

5 THE COURT: We appear to have run ourselves  
6 out of witnesses about 3:10 p.m. Mr. Foran I think is the  
7 next witness, and he would be anticipated, I'm sure, to be  
8 a lengthy witness; is that right?

9 MR. WARE: Hard to say, Your Honor, but I  
10 anticipate we'll go until quitting time with him.

11 THE COURT: Okay. Well, is he available  
12 now?

13 MR. WARE: Yes.

14 THE COURT: Oh, okay.

15 MR. WARE: I think so. I saw him out  
16 there.

17 MR. OTTOWAY: I think he's out there.

18 THE COURT: Okay. I thought I understood  
19 that you were releasing everybody.

20 MR. HAMPTON: No. We released everybody  
21 after him.

22 THE COURT: But Mr. Foran.

23 MR. HAMPTON: Yes, sir.

24 THE COURT: Okay. So both sides agree we  
25 can go ahead and take Mr. Foran?



1 MR. BRAGG: Yes.

2 THE COURT: At least get him started.

3 Well, my understanding -- I understand the next witness  
4 then will be Mr. Foran?

5 MR. WARE: Yes, Your Honor.

6 MR. HAMPTON: Yes.

7 (Witness enters courtroom)

8 THE COURT: You may step up and be seated.  
9 Of course, you were sworn in as a witness earlier. So you  
10 understand you're still under oath?

11 THE WITNESS: Yes.

12 THE COURT: You may be seated.

13 THE WITNESS: Thank you.

14 THE COURT: Applicant may proceed.

15 MR. WARE: Thank you, Your Honor.

16 ROBERT FORAN,  
17 having been previously duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. WARE:

20 Q. Robert, would you state your name for the  
21 record, please.

22 A. It's Robert Foran.

23 Q. Mr. Foran, you're retired from the district  
24 attorney's -- the Tarrant County District Attorney's  
25 office; is that correct?

1           A.     Yes.

2           Q.     Okay.  What do you do now?

3           A.     I help some friends of mine occasionally with  
4 pro bono for some of their clients if they need to kind of  
5 spitball or figure out some trial strategies.  And I look  
6 at some different business opportunities that my brothers  
7 are looking into on occasion.  Unfortunately, they haven't  
8 been very fruitful.

9           Q.     Well, hope springs eternal.

10          A.     Yes.

11          Q.     Sounds like some of the business deals I've  
12 gotten into.

13                         How long have you been retired from the  
14 Tarrant County District Attorney's office?

15          A.     I left at the end of 2014.

16          Q.     And how long were you with the office?

17          A.     I was -- I hired on to the office  
18 September 4<sup>th</sup> of 1990 until the end of 2014.  There was  
19 some time that spilled over because I had vacation time  
20 accumulated I got to take.

21          Q.     Okay.  So you were there well over 20 years?

22          A.     Almost 25.

23          Q.     And what were your various assignments and what  
24 was your experience in the district attorney's office?

25          A.     I spent a year in misdemeanor.  Then I was

1 promoted to felony in September 4<sup>th</sup> of 1991 to the  
2 371<sup>st</sup> District Court. I had a variety -- I was assigned  
3 there. Then I was assigned to Criminal District Court No.  
4 2 as a felony prosecutor. Then I was promoted to court  
5 chief, I think it was February or April of 1996, in  
6 Criminal District Court No. 1. Then I spent a little bit  
7 over two years there.

8 And I took over the gang prosecution unit  
9 and was in there from about 1998 to 2003. Then I was  
10 assigned to Criminal District Court No. 2. And then after  
11 that, I was assigned to the 213<sup>th</sup> District Court as  
12 court chief also.

13 Q. And during that time how many -- how many death  
14 penalty cases did you -- let me ask you how many capital  
15 murder cases do you think you handled altogether, whether  
16 you tried them or not?

17 A. Over 25.

18 Q. And --

19 A. Maybe over 30.

20 Q. And how many death penalty cases did you  
21 actually try to a verdict?

22 A. Six.

23 Q. Six. One of them being Paul Storey's case?

24 A. Yes.

25 Q. So when -- when were you -- at some point you

1       were assigned as first chair in the Paul Storey case; is  
2       that correct?

3           A.     Yes.   Shortly after -- after Mr. Cherry was  
4       killed, the case was filed by the Hurst Police Department.  
5       CDC 3 was next in the capital rotation, and so the case  
6       came to me.

7           Q.     Okay.   But that may have been sometime around  
8       October of 2006?

9           A.     Yes.

10          Q.     And that's the way the office worked back then,  
11       somehow the case came to you because it was your turn?

12          A.     Well, it usually went to a court chief unless  
13       someone higher up or -- had a particular interest or it  
14       came under the purview of some specialized unit like the  
15       gang unit or the crimes against children unit.

16          Q.     And so -- and you're also first chair assigned  
17       to the Mark Porter case, the co-defendant as well?

18          A.     Yes.

19          Q.     Okay.   Do you remember when the case was -- the  
20       cases were indicted?

21          A.     Within 90 days of the filing.

22          Q.     Okay.   January the 12<sup>th</sup> of 2007 sound right?

23          A.     I wouldn't disagree.   I'd have to look at the  
24       file.

25          Q.     Okay.   So, yeah, that's about 90 days.   That

1 would have been about 90 days after filing.

2 A. Uh-huh.

3 Q. So this was -- you got two capital murder -- or  
4 two defendants in a capital murder case. And, of course,  
5 it's -- it's the district attorney's office, I guess  
6 ultimately, the elected district attorney's decision  
7 whether to pursue the death penalty or not, correct?

8 A. Yes.

9 Q. And there's a number of cases in which, you  
10 know, for whatever reason the district attorney's office  
11 decides not to pursue the death penalty, even though under  
12 the law they could?

13 A. There are many.

14 Q. Many. Call those waiver cases?

15 A. Yes.

16 Q. Or mini caps? Is that correct?

17 A. I never used mini caps. But yes, waivers.

18 Q. Okay. We'll use waivers. And that's where the  
19 death penalty is waived, and if the person is convicted of  
20 capital murder, there's not any punishment, they just get  
21 an automatic life sentence?

22 A. That's correct.

23 Q. And life means, depending on what the law is at  
24 that time, it can mean, you know, 30 years without parole  
25 or now it means and at the time this case was pending it

1       meant life without the possibility of parole?

2           A.     Yes.

3           Q.     Okay.  And that's what it means now as well,  
4       correct?

5           A.     Yes.

6           Q.     Okay.  And so in the district attorney's office  
7       back at that time, Tim Curry was still the district  
8       attorney, correct?

9           A.     Yes.

10          Q.     Okay.  And was there a process or procedure of  
11       sorts in at least making a preliminary determination as to  
12       whether to seek the death penalty?

13          A.     Yes.

14          Q.     Okay.  And what was that?

15          A.     Usually soon after indictment or when they --  
16       they would periodically schedule a meeting, a committee  
17       meeting.  And it would usually consist of people like when  
18       Mr. Curry was feeling well, I don't know if he was at the  
19       meeting or not in this case, Alan Levy, whoever any of the  
20       super chiefs would have been at that time, as were the  
21       individuals that were right below Mr. Levy, people like  
22       Greg Miller, Bob Gill.  I don't know if Parrish was still  
23       in the office or not.  There was usually representatives  
24       from the appellate section, Mr. Mallin, Chip Wilkinson.

25          Q.     Chip Wilkinson?

1           A.     Yes.  And usually Alan's administrative  
2     assistant would attend, and that would be Marilyn Carter.

3           Q.     She's retired now?

4           A.     Yes, I believe so.  She retired after I did, so  
5     I don't know.

6           Q.     And this -- did you have a name for this  
7     committee, the death committee?

8           A.     That's what they called it.

9           Q.     The death committee?

10          A.     Yeah.

11          Q.     And who was on the committee would fluctuate  
12     from time to time.  It might depend on whoever was  
13     available at the time that they were ready to meet?

14          A.     You know, all I got -- I don't know exactly who  
15     was a permanent part of it.  All the people I named I  
16     believe were all permanent parts of it.  There may have  
17     been other people that, you know, I don't know -- I can't  
18     recall whether or not the investigators would have sent a  
19     representative or not, you know, for whatever input.  But  
20     I believe I've named all of them, and they would attend if  
21     they were available.

22          Q.     Okay.  And they'd meet once a month or every  
23     other month?

24          A.     It wasn't -- I can't tell you --

25          Q.     On an ad hoc basis?

1           A.     Well, because sometimes we were fortunate enough  
2     not to have that many pending, so I can't tell you that  
3     they met on a regular schedule.

4           Q.     Okay. And what would happen there? The  
5     cases -- would you take up one case at each meeting or  
6     several cases at a meeting or did it depend?

7           A.     It would depend on how many were -- the  
8     individual prosecutors assigned to the case would get a  
9     notice. It might be one or two people. It might be four,  
10    you know. I don't think I've ever attended a meeting  
11    where there was more than three or four people. And then  
12    each one of them would present all the information that  
13    they were aware of at the time.

14          Q.     And when you attended the meetings, is it  
15    because you had a case to present or was it because you  
16    were actually on the committee?

17          A.     No. I only attended when I had a case. I was  
18    not on the committee.

19          Q.     Okay. So whoever had a case to present would  
20    also attend the meetings?

21          A.     Yes.

22          Q.     Okay. At least when they were presenting their  
23    case?

24          A.     Uh-huh.

25          Q.     So you presented the Paul Storey and Mark Porter



1 cases; is that correct?

2 A. Yes.

3 Q. Okay. Do you remember when that was?

4 A. I don't know the exact date.

5 Q. Okay. Do you think it was near the indictment  
6 or shortly thereafter?

7 A. It would have been after the indictment.

8 Q. Do you think it was shortly after the  
9 indictment?

10 A. I don't want to guess, so I can't remember the  
11 exact date.

12 Q. Do you have a ballpark?

13 A. Again, I don't want to -- I assumed if Marilyn  
14 was there, she was taking notes, and her -- if she has the  
15 notes, then they would be more accurate. There's always a  
16 lot of stuff going on, and I don't want to just throw out  
17 something and -- and lead you astray that it happened X  
18 date when I don't really know.

19 Q. No, I understand. I'm not asking you to guess.  
20 I'm not asking for a specific day. But, I mean, you think  
21 it was sometime in 2007?

22 A. It would have been in the first half of 2007.  
23 That's the best I can do.

24 Q. Okay.

25 A. It would not have been later than that, because

1 I would have had to inform the Court so that -- well,  
2 that's probably maybe a more accurate way of looking at it  
3 is that generally when they get a capital murder case, one  
4 lawyer will be appointed, and then when the committee had  
5 made a decision, we would inform the Court because,  
6 obviously, these take a lot of time to try and they have  
7 to be scheduled. And so perhaps a better guideline might  
8 be when second chair was appointed.

9 Q. So if the second chair in this case was  
10 appointed in January or February of 2007, the committee  
11 probably met sometime around then?

12 A. Then that would probably be the case. Or, I  
13 mean, sometimes they would appoint one just in case if  
14 they thought it was a complicated case or whatever. But  
15 that's probably a pretty good guideline.

16 Q. Okay. And so do you -- do you remember -- and  
17 if you don't, that's fine. Do you remember exactly who  
18 was there when you presented the Porter and Storey cases?

19 A. No.

20 Q. But probably some array of people such as you  
21 sort of gone through; is that correct?

22 A. It was generally those people. So I --

23 Q. And they -- and really -- and so they listened  
24 to everything, they maybe discuss and deliberate, and  
25 then, what, did they take a vote whether to pursue the

1 death penalty or not?

2 A. They would reach a decision, just tell me how to  
3 proceed.

4 Q. Okay. And I guess ultimately it was Tim Curry's  
5 decision or whoever the --

6 A. Yes, he would approve it. They would make their  
7 recommendation to him and then he would approve it. And  
8 he would do that if he was present physically or he would  
9 do it later.

10 Q. Okay. So you remember this meeting? I mean,  
11 you don't remember the exact date, but you remember the  
12 meeting?

13 A. I remember presenting.

14 Q. Okay. And what all was discussed as far as  
15 whether to pursue the death penalty or whether to waive it  
16 and pursue it as a waiver?

17 A. Among themselves? They asked me about the case.  
18 Generally, I was just giving them answers about the case,  
19 whether or not there was evidence of premeditation,  
20 whether or not there was, you know, a particular set of  
21 violent circumstances, or any evidence of lack of remorse,  
22 any evidence of extraneous offenses that were violent that  
23 would bear on the individual's future dangerousness, any  
24 other information that might actually militate in his  
25 favor, because, you know, on occasion we have folks that

1 are very troubled that we wouldn't -- we would take that  
2 into account. So we take a lot of things into account.

3 Q. And do you remember it being discussed and it  
4 being a factor in the decision the fact that Jonas  
5 Cherry's parents were against the death penalty?

6 A. I informed -- I believe I informed them at that  
7 time, but Suman Cherry was in favor of it. So I had two  
8 different -- I have a parent, obviously very devout  
9 people, very good people, and I had also a bereaved wife  
10 who had been planning a family with her husband. And, you  
11 know, that's all information that I had.

12 Q. Right. And you didn't -- I mean, you disclosed  
13 that information to them?

14 A. I believe I did, yes.

15 Q. Well, I mean, as far as you know, it was even  
16 discussed as a factor on whether to pursue the death  
17 penalty or not?

18 A. I can't tell you what they -- what factors they  
19 took into consideration personally. You know, like any  
20 group, what was important to some people and not important  
21 to others, I can't tell you.

22 Q. Okay. But you told them about the Cherrys'  
23 opposition to the death penalty?

24 A. I believe I did.

25 Q. And what came out of that meeting?

1           A.     The -- I was told that we were going to pursue  
2     the death penalty but also to offer a life sentence to  
3     both individuals.

4           Q.     To both of them?

5           A.     Yes.

6           Q.     And you don't know but you think maybe that was  
7     based at least in part on the fact that the Cherrys were  
8     against the death penalty?

9           A.     No --

10                   MR. BRAGG:  Objection, Your Honor,  
11     speculation.

12                   THE WITNESS:  -- I don't know.

13                   THE COURT:  I'm going to overrule the  
14     objection and permit the answer.

15                   THE WITNESS:  I don't know and I don't  
16     believe that that -- since that evidence based on my  
17     research wouldn't have been admissible, I don't believe  
18     they would have -- they would have based it solely on  
19     that, especially when you have different family members  
20     who have different opinions, to give greater weight to  
21     theirs than to the wife.

22           Q.     (BY MR. WARE)  So whether it was or whether it  
23     wasn't part of their decision, you knew the Cherrys were  
24     against the death penalty?

25           A.     I knew the parents were.

1           Q.     Yes. And you think you told them that the  
2     parents were against it?

3           A.     I believe so.

4           Q.     Okay. And that may or may not have been a  
5     factor in their ultimate recommendation to offer life to  
6     both of them, that if they turned it down, pursue the  
7     death penalty?

8           A.     I can't speculate as to what factors were  
9     important to them.

10          Q.     At what point did you find out that Jonas  
11     Cherry's parents were against the death penalty?

12          A.     I don't know if I was informed by one of the  
13     police officers or maybe victim assistance. I forget who  
14     brought that to my attention first.

15          Q.     Had you talked to the Cherrys at that point?

16          A.     I don't have my notes from then. I've looked  
17     through the physical files to see whether or not there was  
18     a, you know, any notes in there as to the first time I  
19     talked to them or the first time they communicated  
20     anything to me. I have not looked at case events. Looked  
21     at what the AG's office has and there's no mention in  
22     there, apparently. So I didn't -- I don't have any notes  
23     where I wrote it down.

24          Q.     Okay.

25          A.     This would have been almost ten years ago.

1 Q. So do you remember the first time you did talk  
2 to the Cherrys?

3 A. I can't tell you the specific date because I  
4 didn't find any notes in my file.

5 Q. Yet you -- you were served with a subpoena to  
6 bring any papers that you had or related to this case or  
7 any documents, correct?

8 A. Yes.

9 Q. And you, really, you don't have any, do you?

10 A. No. I -- the card that I gave you --

11 Q. Right.

12 A. -- in our previous meeting, I gave the original  
13 to the AG's office.

14 Q. Right.

15 A. All I had was the writ that I went and looked  
16 at --

17 Q. From the clerk's --

18 A. -- after our meeting.

19 Q. Okay. But you had an opportunity to go look at  
20 everything that was in the DA's file; is that correct?

21 A. With the -- I had an opportunity to look at  
22 everything that was in the possession of the attorney  
23 general when they brought it up.

24 Q. Right. And neither your nor Christy's trial  
25 notes were in there. Would you agree?

1           A.     I didn't -- I was looking for mine. I wasn't  
2 really particularly looking for anything with her  
3 handwriting.

4           Q.     Right.

5           A.     I was just looking for my stuff.

6           Q.     Right.

7           A.     And there was a bunch of typed, you know, notes  
8 for like direct examinations or crosses or stuff like  
9 that. And I don't remember if I just reduced it to that  
10 or we reduced it to that, but I didn't see any handwritten  
11 notes.

12          Q.     Okay. Did you see anything about jury selection  
13 typed or otherwise in there?

14          A.     No.

15          Q.     Do you know what happened to those?

16          A.     Mine?

17          Q.     Yours or Christy's.

18          A.     Well, the policy at that time, I think we had to  
19 return all of our jury questionnaires and stuff. I don't  
20 know if we made it a trial exhibit or we didn't keep it or  
21 we made it another exhibit, I don't recall that.

22          Q.     Okay. So you don't recall what happened to it,  
23 really?

24          A.     They weren't in there.

25          Q.     Huh?



1           A.     They're not in there, so I can't explain that.

2           Q.     You didn't see anything in there, I think you've  
3 already answered this, anything in there about denoting  
4 that the Cherrys were against the death penalty?

5           A.     No, I didn't see anything about that or noting  
6 Suman Cherry's position either.

7           Q.     Okay. You just know what they were?

8           A.     Yes.

9           Q.     Okay. So did you disclose that information to  
10 the four defense lawyers in these two cases?

11          A.     I told Mr. Ray.

12          Q.     You're talking about Bill Ray?

13          A.     Yes. And I disclosed it to -- I can't remember  
14 if it was Mr. Tim Moore or to Mark Daniel. I spent -- on  
15 the Storey case, about 95 percent of my time was spent  
16 talking to Mr. Ray since he was the lead attorney. And  
17 we -- otherwise, we had infrequent conversations about  
18 that case as well as many others that we had.

19          Q.     So how did you disclose that to Mr. Ray?

20          A.     I believe I told him verbally.

21          Q.     And when was that?

22          A.     After -- after the committee had made their  
23 decision and after I had learned of their -- the various  
24 positions.

25          Q.     So you don't know when in the timeline that

1 would have been?

2 A. It's going to be in 2007 sometime.

3 Q. So would you have told Bill Ray that the parents  
4 of the victim were opposed to the death penalty sometime  
5 in 2007?

6 A. I would have told him that as well as Suman  
7 Cherry's position.

8 Q. And once again, that's not reflected, your  
9 communication of that information to Bill Ray or anyone  
10 else is not in the file or anywhere that you're aware of?

11 A. Not in the -- in any of the files I looked  
12 through, it's not in there.

13 Q. Do you think you did communicate it in writing?

14 A. No.

15 Q. So that would explain why there's nothing in the  
16 files?

17 A. Right.

18 Q. Okay. Did you make even an internal note to  
19 yourself or to the file that that had been communicated?

20 A. No, that -- I don't recall doing that. Again,  
21 I've just looked at the files recently after ten years --  
22 or not ten years, nine years.

23 Q. A while.

24 A. Yeah.

25 Q. But you believed it was important to communicate

1       that information?

2           A.       I believed it was information just like any  
3       other information. And, you know, the longstanding policy  
4       of the district attorney's office was to disclose the  
5       information you had, not put it through some sort of  
6       admissibility or filter but just simply if you knew  
7       something, tell them, whether it was admissible or not.

8           Q.       Did you ever have a conversation with Larry  
9       Moore about the Cherrys being against the death penalty?

10          A.       I don't recall having any specific conversations  
11       with Mr. Moore about it. I believe there was conversation  
12       that Christy and I had with Bill during one of the breaks  
13       during voir dire. I think Mr. Moore was present, but  
14       whether or not he was paying attention or -- I don't  
15       recall him participating in the conversation.

16          Q.       Was anybody else present besides Bill Ray and  
17       Larry Moore and you and Christy?

18          A.       It was just generally the four of us. The judge  
19       would -- when we took breaks, everybody would kind of go  
20       their own way and wait to restart.

21          Q.       So did Bill or Larry, either one, say at any  
22       time, Robert, why are y'all going forward with the death  
23       penalty when the parents are against it? Would you have  
24       that kind of discussion?

25          A.       Bill Ray wanted us to waive it and I said no.

1 Q. For that reason?

2 A. He mentioned that they're opposed to it and I  
3 said, well, his wife is not opposed to it. You know, it's  
4 not -- I mean, I can't give -- I'm not going to give  
5 greater weight to one part of the family than the other.  
6 I needed to make my decision based on whether to  
7 proceed -- whether to offer a life sentence or proceed  
8 based on the evidence as I knew it.

9 Q. But you did have that discussion?

10 A. I believe so.

11 Q. Okay. And what about with Larry, did you have  
12 that discussion with Larry?

13 A. No.

14 Q. Okay. And did either one of them say, hey,  
15 Robert, do you mind if we go to Levy or Curry or someone  
16 with this information about the parents not being in favor  
17 of going forward with the death penalty and see if we can  
18 get a waiver on this case?

19 A. I don't recall them saying that. Frequently,  
20 defense attorneys didn't really ask me if they could go  
21 above me. So if they did or they wanted to, they  
22 sometimes told me out of courtesy, but otherwise, they  
23 just did it.

24 Q. So -- but as far as you know, they didn't in  
25 this case?

1           A.     I was never informed that they did it.

2           Q.     Okay.

3           A.     Because, you know, sometimes when they get a no,  
4     neither they informed me nor did my superiors.

5           Q.     So same question with Mark Daniel and Tim Moore.  
6     I mean, Mark Porter turned down a life sentence as well,  
7     right?

8           A.     At first.

9           Q.     Okay. Well, he turned it down and it was off  
10    the table until after Paul Storey's case was tried, right?

11          A.     Right.

12          Q.     So -- and at one point he was even going to go  
13    first. You remember that?

14          A.     Yes.

15          Q.     And there was some -- Tim Moore or somebody had  
16    a conflict and you flipped the order?

17          A.     The scheduling of, you know, four defense  
18    attorneys with a heavy load, it just kind of -- it just  
19    really depended on which window opened up for the two  
20    lawyers.

21          Q.     So Mark Porter at one point was going to go  
22    first, and you told Tim Moore and/or Mark Daniel about the  
23    Cherrys, Mr. and Mrs. Cherry, Jonas Cherry's parents being  
24    against the death penalty?

25          A.     As well as Suman's position, yes.

1           Q.     Yeah, I understand.

2                     And was -- and, of course, their client  
3     turned down a life sentence?

4           A.     Yes.

5           Q.     And that was all before Paul Storey went to  
6     trial, right?

7           A.     Yes.

8           Q.     So at the time, certainly at the time Paul  
9     Storey was going to trial, well, even before that, they  
10    were going to go to trial first on the death penalty,  
11    their client having turned down a life sentence, correct?

12          A.     Yes.

13          Q.     Okay. And likewise, did they have that kind of  
14    reaction? Did they say, wait a minute, you're going  
15    forward with the death penalty when the parents of this  
16    28-year-old young man, their only child, are against the  
17    death penalty and you're going forward with the death  
18    penalty anyway? Did they ever have that conversation?

19          A.     I don't recall having that particular  
20    conversation with them in that sense because I would have  
21    responded about Suman Cherry's position.

22                     Their particular focus was blaming it all  
23    on your client, that he, in fact, was responsible for all  
24    of the shooting and that Mark Porter was simply a dupe and  
25    not very bright. And that was their complete focus.

1 Because there were two weapons used, I think six or seven  
2 shots from one, one shot from the second gun, and their  
3 position was their guy just fired because your client made  
4 him to.

5 Q. Okay. And, of course, you believed all that?

6 A. No.

7 Q. So as a result -- in fact, at one point  
8 Mr. Porter was going to go first, correct?

9 A. Right.

10 Q. Because you didn't necessarily believe all that?

11 A. I didn't care which one of them wanted to  
12 quarrel about the honor of shooting the fatal shot. I  
13 believed it was a joint venture, premeditated, and their  
14 opportunity was to spare themselves a trial by taking a  
15 life sentence.

16 Q. Do you have any idea why both Tim Moore and Mark  
17 Daniel would say they never -- were never told at any time  
18 anything close to Jonas Cherry's parents were against the  
19 death penalty? Do you have any idea why they would say  
20 that?

21 MR. OTTOWAY: Speculative, Your Honor.

22 THE WITNESS: I don't know --

23 THE COURT: I'm going to allow the answer.

24 THE WITNESS: I don't know why they would  
25 say that. It's a fact that I told them. I can't

1 speculate as to why they would say it.

2 Q. (BY MR. WARE) So at some point Christy became  
3 second chair?

4 A. In 2008.

5 Q. 2008. So at some point the order got switched  
6 and Paul Storey is going to trial first. You've disclosed  
7 to Larry and Bill that the Cherrys are against the death  
8 penalty?

9 A. I know that I talked to Mr. Ray about it.  
10 Whether or not I talked specifically to Larry I don't  
11 recall that. And whether or not he participated or was  
12 listening when we had the conversation during jury  
13 selection I don't know.

14 Q. Did you tell anybody else that the parents were  
15 against the death penalty?

16 A. Well, my investigator knew it.

17 Q. And who is that?

18 A. Mike de la Flor.

19 Q. Okay.

20 A. Victim assistance Linda Bigham would have known  
21 it.

22 COURT REPORTER: Who?

23 THE WITNESS: Linda Bigham. They would  
24 have known that. They would have known at the time what  
25 the position was of the, you know, various members of the



1 family.

2 Q. (BY MR. WARE) Now, did you and Christy discuss  
3 how you were going to deal with that fact at trial?

4 A. Well, I didn't really think we were going to  
5 have to --

6 Q. Okay.

7 A. -- because I didn't think it was admissible.  
8 The opinion, long-held belief of someone. I didn't  
9 believe it fell under admissible evidence as to tell what  
10 a jury who heard the evidence, what they should decide  
11 based on the evidence. Certainly it didn't come under  
12 victim impact because it wasn't as a result of the crime.  
13 This was a long-held belief that they had before the trial  
14 or the event. And so I just -- if it came up, I would  
15 have asked for a hearing.

16 Q. You didn't call Jonas Cherry's parents as  
17 witnesses?

18 A. No.

19 Q. Did you discuss all this -- do you remember the  
20 extern Ashlea Deener?

21 A. I don't know --

22 Q. Do you remember her?

23 A. I do.

24 Q. Okay. Do you remember discussing this issue  
25 with her?

1           A.     I don't remember discussing legal issues with  
2 her.

3           Q.     Do you remember her asking how you were going to  
4 deal with it?

5           A.     She didn't ask me a whole bunch of questions  
6 about legal matters or trial strategy. She was primarily  
7 Christy's intern. She was of great assistance in  
8 organizing the files and getting stuff together. But most  
9 of the communications were with Christy.

10          Q.     Okay. You don't remember her asking you and  
11 Christy how y'all were going to deal with it and y'all  
12 answering, we're just not going to call them as witnesses?

13          A.     I don't recall saying that myself. I don't know  
14 if Christy did.

15          Q.     Okay. So -- so do you remember talking to Bob  
16 Gill about the issue?

17          A.     I remember that Christy and I were updating him  
18 on the progress of the case, where it stood, that we --  
19 you know, what offers were out there, the positions of the  
20 various family members, both Suman and the Cherrys  
21 regarding the death penalty. So it was kind of a number  
22 of -- it was several -- sorry. It was several things, not  
23 just their position.

24          Q.     Okay. Do you remember when that conversation  
25 was?

1           A.     It would have been in 2008, and it would have  
2     been before your client's rejection of the plea offer.

3           Q.     Okay. But you had disclosed -- had you  
4     disclosed the fact that the Cherrys were against -- I  
5     mean, you knew the Cherrys were against the death penalty  
6     long before that, correct?

7           A.     Yes.

8           Q.     How long did it take you to disclose that to  
9     defense counsel?

10          A.     I don't know when it came up. I don't -- it  
11     came up in conversations with Mr. Ray. I don't know the  
12     precise day.

13          Q.     Do you know an approximate date?

14          A.     I'm not going to guess.

15          Q.     Not even an approximate date?

16          A.     Not willing to guess.

17          Q.     Okay. But in any event, you don't even know if  
18     it was in 2007?

19          A.     It would have been sometime in -- before -- it  
20     would have been before Christy came on the case, so  
21     probably in 2007.

22          Q.     Probably in 2007. Okay.

23                     When you disclosed to Bill Ray?

24          A.     Yes.

25          Q.     Okay. And so in 2008 you had a conversation

1 with -- you know, Bob Gill was out of the office until  
2 July 1<sup>st</sup>, 2008.

3 A. So I was incorrect on the approximate time, but  
4 it would have been sometime when Bob came aboard, to  
5 update him. And also, Christy hadn't been on the case as  
6 long as I had. And, you know, so we just brought  
7 everybody up to speed.

8 Q. Okay.

9 A. That's why I don't want to guess on any of these  
10 dates.

11 Q. But you wouldn't have had a conversation with  
12 Bob Gill about whether to disclose the death penalty --  
13 excuse me, disclose that the parents were against the  
14 death penalty, you wouldn't have had that conversation  
15 after you'd already disclosed it, would you?

16 A. I wasn't asking him for permission. I was  
17 updating him on what the facts in the case were, what  
18 everybody's position was. I wasn't asking for him to give  
19 me permission to disclose it or advice on how to disclose  
20 it. I disclosed it already. I was just trying to put him  
21 in the picture of what these two cases were -- involved.  
22 He was my direct supervisor.

23 Q. Okay. So if he were -- if he testified that he  
24 was -- you, in part, you were asking him whether it was a  
25 good idea to disclose, he remembers that differently than

1     you?

2           A.     If that's how he remembers, but that's not how I  
3     felt that I conveyed it or that -- how I intended it.

4           Q.     And you, in fact -- okay.

5                     So y'all proceed to trial, he turns down a  
6     life sentence?

7           A.     And then we proceed to jury selection, yes.

8           Q.     Did you notify the Cherrys that you had offered  
9     a life sentence and he had turned it down?

10          A.     We'd had a meeting all together. I believe  
11     Suman was present as well as both the Cherrys. And we  
12     explained the options --

13          Q.     Do you know when that was?

14          A.     No. We explained the options --

15          Q.     Was there any memo in the file denoting when  
16     that was?

17          A.     No.

18          Q.     Okay. You can continue.

19          A.     All the options were explained, just as the  
20     decision to pursue the death penalty, that we would --  
21     were going to make the offer of a life sentence, and if he  
22     rejected it, we would pursue the death penalty.

23          Q.     So you remember Christy Jack's argument to the  
24     jury that -- or maybe you don't remember, but you're  
25     familiar with it now, that it should go without saying

1     that Paul Storey's (sic) family and everyone who loved him  
2     believed the death penalty is appropriate. You remember  
3     that?

4           A.     I did not recall it until I read the transcript.  
5     I know we discussed briefly together, and then when I read  
6     the transcript I saw the language.

7           Q.     Okay. Did she discuss that argument with you  
8     before she made it?

9           A.     No.

10          Q.     Did y'all discuss that argument after she made  
11     it?

12          A.     No.

13          Q.     You would agree that Jonas Cherry's parents are  
14     certainly his family, correct?

15          A.     Yes.

16          Q.     You would agree that they were certainly people  
17     who loved him, correct?

18          A.     Yes.

19          Q.     You'd agree that they didn't testify at the  
20     trial, correct?

21          A.     Yes.

22          Q.     So at the very least, that argument was outside  
23     the record?

24                   MR. OTTOWAY: Your Honor, this can be made  
25     at argument instead of asking the witness a question about

1       whether it was outside the record.

2                   THE COURT:   Any response?

3                   MR. WARE:   Well, I kind of want to get his  
4       thought processes about this argument.

5                   MR. OTTOWAY:   The record is the record,  
6       Your Honor.

7                   THE COURT:   Well, I understand.   And I've  
8       seen it myself.   But for purposes of this hearing, I'm  
9       going to allow this to develop.   So both sides can develop  
10      whatever they need to.   I'm going to allow the question at  
11      this time.

12                   MR. OTTOWAY:   May I have a running  
13      objection?

14                   THE COURT:   Very well.

15           Q.     (BY MR. WARE)   So at the very least the argument  
16      was outside the record?

17           A.     On their position before the trial, yes.

18           Q.     I mean, outside the record means there was no  
19      testimony supporting --

20           A.     Right.

21           Q.     -- her argument?

22           A.     That all of the members --

23           Q.     That his -- that Jonas Cherry's family and  
24      everyone who loves him are -- believed the death penalty  
25      is appropriate.

1           A.     We did not elicit that testimony.

2           Q.     So at the very least it was outside the record?

3           A.     Yes.

4           Q.     And to that extent an improper argument?

5           A.     I don't -- I'm not -- I don't want to conjecture  
6     about how I would phrase it.  Because after all, they had  
7     introduced -- I don't want to weigh on that.  I just -- I  
8     will say that it wasn't in the record what their position  
9     was.

10          Q.     Okay.  And, in fact, I think you testified  
11     earlier that you believe the law was you could not put it  
12     in the record what their position was?

13          A.     Well --

14          Q.     Because you said y'all didn't even really worry  
15     about the fact that the Cherrys were against the death  
16     penalty because that couldn't go in the record anyway?

17          A.     Right, just like I couldn't put in Suman  
18     Cherry's desire for the death penalty.

19          Q.     Right.

20          A.     I didn't try to offer that either.

21          Q.     So you would agree that it's also improper, if  
22     it's not admissible as evidence, it's also improper to  
23     inject it in front of the jury in final argument?

24                   MR. OTTOWAY:  Your Honor, if they want to  
25     make that argument, that's fine.  I don't know, again, why



1 this needs to be questions.

2 MR. WARE: Well, I mean, this goes to the  
3 crux of our claims.

4 MR. OTTOWAY: It's argument.

5 THE COURT: I understand. I'm going to go  
6 ahead and permit the development. I'll be able to sort it  
7 out, I think.

8 THE WITNESS: What was the question?

9 MR. WARE: I'll move on.

10 THE WITNESS: Okay.

11 Q. (BY MR. WARE) So is it your testimony, I guess,  
12 that at some point -- I mean, was this a lie that Christy  
13 told or is it your testimony that at some point the  
14 Cherrys completely reversed their position and said now  
15 we're for the death penalty and that --

16 A. No, I'm not -- I won't say that. I know that  
17 Mr. Cherry approached Christy at one of the breaks after  
18 the defendant's mother testified and made her plea.

19 Q. And you and Christy have talked about this, have  
20 you not?

21 A. Well, I talked about it with her and I told you  
22 in your meeting -- our meeting.

23 Q. Well, you didn't, but --

24 A. I offered to give you two affidavits summarizing  
25 what our meeting was, but you didn't want it. So -- but

1 she did -- there was -- one of them approached. I told  
2 you that one of the parents approached and --

3 Q. You don't remember which one?

4 A. I believe it was Glenn, but I'm not positive.

5 Q. And when was -- when did this happen?

6 A. After -- during the punishment phase and --

7 Q. And this is the first time anything like this  
8 had happened?

9 A. I'm sorry?

10 Q. This is -- go ahead. I'm sorry.

11 A. They -- he wanted -- he or she wanted to know  
12 whether or not they needed to testify in rebuttal and we  
13 told them no.

14 Q. So that happened after the punishment phase?

15 A. During the punishment testimony.

16 Q. It happened during the punishment testimony?

17 A. They were in the trial court the entire trial.

18 Q. Okay. And so during the punishment testimony, I  
19 think one of the two parents approached and said, do we  
20 need to testify in rebuttal?

21 A. Right. I don't know -- I don't recall the exact  
22 language that they used. Christy said simply no, and I  
23 didn't feel -- and I agreed that there wasn't any reason  
24 for them to testify in rebuttal because the facts were  
25 fully developed and I didn't think they needed to have any

1 unnecessary pain to put them on. And, you know, we --

2 Q. So was he or she, whichever it was, was anybody  
3 else present for this conversation?

4 A. It was at the rail. I don't know who else was  
5 listening.

6 Q. Okay.

7 A. And I can't tell you what the exact language  
8 they -- the person, whichever one it was, used to Christy.  
9 She would have a better memory on that. I don't recall  
10 because the question was directed at her.

11 Q. Okay. Well, was there a conversation with you  
12 and this person before Christy walked up?

13 A. No.

14 Q. Okay.

15 A. We were standing at counsel table.

16 Q. Okay.

17 A. Or near the gate --

18 Q. So she should have heard anything you heard?

19 A. She should have -- she should have -- it was --  
20 the conversation was directed at her.

21 Q. So it was directed at her?

22 A. Yes.

23 Q. Not you?

24 A. No.

25 Q. Okay. And what you heard is, do we need to

1       testify in rebuttal?

2           A.     Yes.

3           Q.     Did you hear anything beyond that?

4           A.     I can't remember the exact substance of how they  
5       phrased it.

6           Q.     Okay. Did -- did he -- if that's all he said,  
7       he didn't get into any specifics about what he would  
8       testify to in rebuttal?

9           A.     I don't recall specifically what he would say.  
10       I think he was -- I got the feeling that he was upset  
11       that, you know --

12          Q.     Well, you got the feeling, but that's all he  
13       said, so --

14          A.     I can't recall the exact words, so I don't want  
15       to speculate as to what they were.

16          Q.     Well, I mean, are you saying that after all this  
17       time since you started talking to them, whenever it was in  
18       2007, here we are in 2008 and they're opposed to the death  
19       penalty, opposed to the death penalty, you're maybe even  
20       discussing it at the death penalty committee, you're  
21       talking to Bob Gill about it, all this time you're  
22       disclosing it to Larry --

23          A.     Not to Larry.

24          Q.     After all this time, your position is not that  
25       all of a sudden they flipped and they were for the death

1 penalty?

2 A. No. And I disclosed it to Mr. Ray. I believe  
3 my testimony was --

4 Q. I'm sorry, can you keep your voice up?

5 A. I disclosed it to Mr. Ray. As I previously told  
6 you, I don't have a specific recollection of talking to  
7 Mr. Moore about -- Larry Moore about it. And I'm not  
8 going to say that they flipped on whatever their opinion  
9 was.

10 Q. Do you remember telling the newspaper that y'all  
11 disclosed it to the lawyers and they damn well know it?

12 A. Yes.

13 Q. And you told the newspaper it was the Defense  
14 that decided not to call the parents to the stand?

15 A. Yes.

16 Q. Is that correct?

17 A. Yes.

18 Q. And, of course, what you're saying is, they made  
19 the decision not to call the parents to the stand even  
20 though they believed the Storeys (sic) were against the  
21 death penalty, correct?

22 A. Well, I conveyed it to Mr. Ray. I told him that  
23 I had informed the Storeys -- not the Storeys, the Cherrys  
24 of the possibility that either side could call them as  
25 witnesses. And so they were aware they could possibly be

1 called as a witness. Mr. Ray, I'd already conveyed the  
2 information.

3 Q. And you would have been surprised if they'd  
4 called them as witnesses?

5 A. I would have been surprised, but because --

6 Q. Because they had things to say that were  
7 favorable to the defendant --

8 A. Actually --

9 Q. -- they were against the death penalty?

10 A. I would have been surprised because I believe  
11 under the state of the law at that time it was  
12 inadmissible and we would have had a hearing on it. And  
13 also, it may have been a trial tactic rather than put up  
14 a -- sympathetic parents. So I don't know. I can't tell  
15 you what went into their decision-making process. I can  
16 only tell you what I did.

17 Q. Okay. But it -- certainly, it would have been  
18 rational for them to attempt to put the Storeys (sic) on  
19 because the Storeys (sic) were against the death penalty?  
20 I mean, that much would have advanced their side.

21 A. I'm not going to guess as to what their strategy  
22 was any more than what their strategy was on mitigation  
23 evidence and all those other matters that were addressed  
24 in the previous writ. I'm not going to guess as to what  
25 went into their thought process. I don't know.

1           Q.     But in any event, they were certainly under the  
2 belief or under the understanding that the Storeys (sic)  
3 were against the death penalty at a time when they had an  
4 opportunity to put them on?

5           A.     I can speak as far as Mr. Ray, that I had  
6 previously informed him, so, yes.

7           Q.     So when Christy argued that, in fact, Jonas  
8 Cherry's family and everyone who loved him believed the  
9 death penalty was appropriate, that -- you don't remember  
10 that argument?

11          A.     I was pretty focused on what I was going to  
12 argue.

13          Q.     I understand.

14          A.     And so -- I believe it was one line out of I  
15 don't know how many pages of argument. It didn't really  
16 make that much of an impression on me at that time because  
17 it was one statement and I was focused on what I was going  
18 to do.

19          Q.     Well, wasn't it your impression that, whether it  
20 was one statement or just one line or two lines, that it  
21 was an untrue statement in that Mr. and Mrs. Cherry, the  
22 parents were, in fact, against the death penalty?

23          A.     It was untrue in part because they were against  
24 the death penalty, but Suman, of course, and other friends  
25 were in favor of it, so.

1           Q.     Okay.  So the statement was untrue at least as  
2     to the parents Mr. and Mrs. Cherry?

3           A.     Yes, in part.

4           Q.     And your recollection is Larry -- neither Larry  
5     nor Bill objected to it?

6           A.     I don't recall them objecting.

7           Q.     I mean, they didn't say -- they didn't say  
8     outside the record.  They didn't even stand up and say,  
9     wait a minute, that's -- that's a lie.  We've been talking  
10    about -- for the last year we've been talking about how  
11    extraordinary it is that the parents are against the death  
12    penalty, and this case is going death penalty anyway, and  
13    here she is up here lying to the jury about what we've  
14    been talking about for the last year.

15          A.     No.  You know what, I didn't testify that we've  
16    been talking about it for the last year or that they'd  
17    made this argument that it was so extraordinary that we  
18    were pursuing it.

19                   Mr. Ray was aware of it.  I can't tell you  
20    what kind of communications occurred between him and  
21    Mr. Moore.  I wasn't part of them.  I can't tell you what  
22    Mr. Moore knew or didn't know and why they chose to -- not  
23    to object or to sit silent.  I can't speculate as to that.

24          Q.     Nor did they approach you afterwards and say,  
25    what was up with that argument, I thought the Cherrys were



1       against the death penalty?

2           A.       They didn't have that conversation with me.   So.

3                   MR. WARE:   We'll pass the witness.

4                   THE COURT:   The State may cross-examine the  
5       witness at this time.

6                   MR. OTTOWAY:   Thank you, Your Honor.

7                               CROSS-EXAMINATION

8       BY MR. OTTOWAY:

9           Q.       Mr. Foran, I think we have covered this, but I  
10       want to make sure it's clear.   Life was offered in this  
11       case, correct?

12          A.       Yes, and it was extended a second time.

13          Q.       When was it extended to?

14          A.       During jury selection early on, the attorneys  
15       for the Defense -- Mr. Moore and Christy was having a  
16       conversation with Bill and with Larry early on in the jury  
17       selection process, and they said something to the  
18       effect -- she was asking why he didn't take the deal, and  
19       they were like, we were having difficulty convincing him  
20       of the reality of his situation.   So we extended it for a  
21       period of time.   I forget how long.   And they simply said  
22       he hadn't changed his mind.   So we left it at that.

23          Q.       And so you would have been fine had he accepted  
24       a life sentence at that point?

25          A.       Just like I was fine with Mark Porter taking

1 one. I was fine either way.

2 Q. In fact, you were the one who, you know,  
3 finalized the deal with Mark Porter, correct?

4 A. Yes.

5 Q. So whether anybody got life in this case, you  
6 didn't have any particular druthers over punishment?

7 A. I didn't. Either -- either would have been  
8 appropriate in a plea bargain. I still believe that  
9 today, if either of them accepted it.

10 Q. So you weren't trying to hold back evidence for  
11 a strategic advantage so you could get the death penalty  
12 in this case?

13 A. No.

14 Q. You talked about that you had a sitdown  
15 conversation with Suman, Judith, and Glenn Cherry about  
16 the potential routes that this case could take, correct?

17 A. Yes.

18 Q. Did you tell them ultimately what the State was  
19 going to do?

20 A. If they turned down the plea bargain, yes, that  
21 we would pursue the death penalty.

22 Q. And did they ever tell you not to seek death at  
23 that point?

24 A. No. They expressed their philosophy or their  
25 beliefs, their strong beliefs, but they did not say don't

1 do this.

2 Q. Did you keep up at all with the Boston bomber  
3 case?

4 A. No.

5 Q. Did you know that family members in that case  
6 went to the press and expressed their preference for a  
7 life sentence?

8 MR. WARE: I'm going to object to this as  
9 irrelevant.

10 MR. OTTOWAY: I'm just asking if he knows,  
11 Your Honor.

12 THE COURT: Well, I do think it's  
13 irrelevant for this matter, so I'll sustain at this time.

14 Q. (BY MR. OTTOWAY) Did you ever tell the Cherrys  
15 that they couldn't tell anybody about their preference  
16 with respect to -- or let's say their philosophical belief  
17 regarding the death penalty?

18 A. No.

19 Q. So they certainly could have told the press,  
20 couldn't they?

21 A. Yes.

22 Q. They could have told anybody that they wanted  
23 to?

24 A. Yes.

25 Q. Did you ever have a discussion with them about

1 the potential for them becoming Defense witnesses?

2 A. At one point I always -- in every case I tell  
3 people that there's a potential for the Defense to want to  
4 interview you, call you as a witness, depending on what  
5 you have to say. At that time I believe it was Glenn who  
6 didn't really want to talk about the case with the  
7 Defense.

8 I told him that, here's the thing. That is  
9 a personal decision. I can't give you any guidance on it.  
10 And certainly the Defense is free to contact you. And if  
11 you want me to facilitate -- if they want to contact you,  
12 I would be more than happy to facilitate it, even provide  
13 a conference room. So they said, well, if they contact  
14 us, they contact us. But they understood that that was  
15 entirely up -- a possibility that the Defense would  
16 contact them.

17 Q. Did you ever relate to the Defense essentially  
18 the Cherrys' preference for contact?

19 A. I believe we had a conversation with Mr. Ray and  
20 Mr. Moore that they preferred not to be contacted, but I  
21 explained the same information I just related and that  
22 they certainly were free to contact them or not contact  
23 them. I certainly wasn't preventing them. I explained to  
24 the Cherrys that the Defense was entitled to contact them  
25 if they chose to.

1           Q.     I think a little bit earlier you had mentioned  
2     if the Cherrys, and by that I mean Judith and Glenn Cherry  
3     potentially became witnesses for the Defense, that you  
4     would have a hearing on it?

5           A.     I would have objected because I would have  
6     anticipated that that was probably the only area they were  
7     going into because I hardly think they would have elicited  
8     victim impact.

9           Q.     And why do you think they wouldn't have elicited  
10    victim impact from them?

11          A.     Because the parents in their own way were just  
12    as devastated as his wife, so why -- why bring out more  
13    information on how a terrible crime impacted their life.

14          Q.     So calling them could have potentially  
15    reiterated thrice for the devastating impact of Jonas  
16    Cherry's death on the Cherry family?

17          A.     I believe so.

18          Q.     Do you recall whether Glenn and Judith Cherry  
19    attended the guilt-innocence and punishment phases of  
20    trial?

21          A.     Yes.

22          Q.     At any time during those proceedings, did the  
23    Cherrys ever come to you and say stop pursuing the death  
24    penalty?

25          A.     No.

1           Q.     Did they ever come to you and say, this is a  
2     travesty that you're proceeding the way that you are in  
3     seeking the death penalty?

4           A.     No.

5           Q.     You had mentioned that one of the two Cherrys, I  
6     believe you thought it was Glenn, approached Ms. Jack  
7     about testifying?

8           A.     Yes.

9           Q.     Do you know why he wanted to testify?

10                  MR. WARE:   He's already testified to what  
11     he heard, what he didn't hear.   I'm going to object to him  
12     speculating at this point.

13                  THE COURT:   Any response?

14                  MR. OTTOWAY:  I'll rephrase, Your Honor.

15                  THE COURT:   All right.   You may.

16           Q.     (BY MR. OTTOWAY)  Was it your impression that  
17     Glenn Cherry wanted to testify on behalf of Mr. Storey?

18           A.     No.

19           Q.     And so he wanted to testify as a witness for the  
20     State?

21           A.     Yes.

22           Q.     Did you think that he wanted to testify that he  
23     didn't think the death penalty was appropriate?

24                  MR. WARE:   I'm going to object to  
25     speculation at this point.   I mean, unless he knows.

1                   THE COURT: I'll allow him to answer it if  
2 he knows.

3                   THE WITNESS: He was upset by the testimony  
4 he'd heard, so I assume he wanted --

5                   MR. WARE: I'm going to object to any  
6 assumption.

7                   THE COURT: I'll sustain the objection.

8                   MR. WARE: I mean, I know what they're  
9 trying to do here. We all know what they're trying to do  
10 here, and it's not right.

11                  MR. OTTOWAY: Your Honor, I would ask that  
12 to be stricken.

13                  THE COURT: Well, I'm going to filter all  
14 this out eventually.

15                  MR. OTTOWAY: Well, I would still object to  
16 the side-bar, Your Honor.

17                  THE COURT: It's not necessary to make a  
18 side-bar.

19                         You may ask your next question.

20           Q.     (BY MR. OTTOWAY) Do you recall when one of the  
21 Cherrys, and probably Glenn, approached Ms. Jack about  
22 testifying?

23           A.     It was sometime after Ms. Shankle's testimony.

24           Q.     Now, only if you know, do you know why he  
25 approached her at that time?

1           A.     He was upset about the plea for -- on behalf of  
2 her son and he wanted to testify in rebuttal.

3           Q.     And this was before closing argument?

4           A.     Yes.

5           Q.     And you said Glenn and Judith Cherry were there  
6 throughout the entire sentencing proceeding, correct?

7           A.     Yes.

8           Q.     So they heard the verdict of death for  
9 Mr. Storey?

10          A.     Yes.

11          Q.     At that time did they ever approach you and  
12 disagree with your decision to seek death?

13          A.     No.

14          Q.     At any time after the decision or, I'm sorry,  
15 after the verdict for death did they ever tell you that  
16 this was a travesty?

17          A.     No.

18          Q.     Did you ever receive anything from Glenn and  
19 Judith Cherry after the trial?

20          A.     Myself and Christy Jack received a card.

21                   MR. OTTOWAY: Your Honor, may I approach,  
22 please?

23                   THE COURT: You may.

24                   MR. OTTOWAY: For purposes of the record, I  
25 am showing what has been admitted as State's Exhibit 1.



1           Q.    (BY MR. OTTOWAY) Mr. Foran, could you please  
2    take a look at that?

3           A.    Yes.

4           Q.    Do you know what that item is?

5           A.    It is a card that I received -- or Christy and I  
6    received from Glenn and Judy Cherry after the trial.

7           Q.    And to be clear, that is a photocopy of the  
8    card, correct?

9           A.    Yes.

10          Q.    And did you have the original card in your  
11   possession?

12          A.    I did.

13          Q.    And why did you keep that card?

14          A.    I rarely got thank-you notes, honestly, you  
15   know. People would say thanks for doing something, but  
16   you rarely got somebody to actually memorialize it. And  
17   these are -- you know, I've met a lot of very good people  
18   throughout my career, and they're certainly two of the  
19   best.

20          Q.    And although the letter is absolutely admitted  
21   into evidence here, was there anything in there that  
22   suggested that they were upset at the verdict that  
23   occurred?

24          A.    There's no mention of it.

25          Q.    Do you know a or did you know a Robert Ford,

1 also known as Bob Ford?

2 A. Yes.

3 Q. And he was an attorney here in Fort Worth?

4 A. Yes.

5 Q. And he was what we would call a writ attorney or  
6 a post-conviction attorney?

7 A. He would also do trial work, but he did mostly  
8 appellate work, and he did writs also.

9 Q. And did you know that he was representing  
10 Mr. Storey on his state habeas application?

11 A. I did.

12 Q. Did you ever have a conversation with Bob Ford  
13 about the Storey case?

14 A. In passing, that's about -- not in any detail.

15 Q. If he had asked you any questions about the  
16 case, would you have been willing to meet with him and  
17 discuss the case?

18 A. Yes.

19 Q. Including the -- Judith and Glenn Cherry's  
20 opposition -- philosophical opposition to the death  
21 penalty?

22 A. I would have answered any of his questions he  
23 asked me.

24 MR. OTTOWAY: No further questions, Your  
25 Honor.

1 THE COURT: Any other questions by --

2 REDIRECT EXAMINATION

3 BY MR. WARE:

4 Q. But you never told Bob Ford that they were  
5 against the death penalty, did you?

6 A. I assumed -- I didn't discuss the case in detail  
7 with Mr. Ford --

8 Q. It's a pretty simple question.

9 A. Well, you know, I'm going to answer the question  
10 as I believe --

11 Q. You answered the --

12 A. I'll ask it -- answer it as I believed you asked  
13 it.

14 Q. Don't point at me, Robert.

15 THE COURT: One at a time. One at a time.  
16 Let's have a question and an answer.

17 Q. (BY MR. WARE) Listen to my question.

18 A. Oh, I'm listening.

19 MR. OTTOWAY: Your Honor, this is badgering  
20 at this point.

21 THE COURT: Well, let's just keep it  
22 simple. Ask a question, see what the response is.

23 Q. (BY MR. WARE) You never told Bob Ford that the  
24 Cherrys were philosophically, ethically, spiritually  
25 opposed to the death penalty?

1           A.     I didn't discuss --

2           Q.     That's a yes or no question.

3           A.     No.

4           Q.     Thank you.

5           A.     That's all right.

6           Q.     And, in fact, the Cherrys are wonderful people,  
7 aren't they?

8           A.     Yes, they are. Outstanding people.

9                     MR. WARE: Pass the witness.

10                    THE COURT: Any other questions from the  
11 State?

12                    MR. OTTOWAY: Nothing further, Your Honor.

13                    THE COURT: All right. Do y'all want to  
14 keep Mr. Foran on call?

15                    MR. WARE: We do, Your Honor.

16                    THE COURT: All right. You may step down  
17 at this time. But remain available in case you're needed  
18 later. Of course, you're still under oath and under the  
19 Rule.

20                    It is 4:22 p.m. and I understand the other  
21 witnesses have been deferred until tomorrow. So  
22 9:00 o'clock tomorrow morning. Anything else for the  
23 record?

24                    MR. WARE: Your Honor, that's all. Are we  
25 contemplating going an extra day beyond tomorrow on a date

1 to be named later?

2 THE COURT: Well, I'm contemplating the  
3 necessity of an additional day, and I'm going to talk to  
4 the coordinator about the days. You might know I'm  
5 otherwise scheduled to shift courts on Wednesday, so I'll  
6 be prepared to go either place.

7 MR. WARE: We have -- we have a witness,  
8 and he's given an affidavit, if they don't object to the  
9 affidavit, then that might be sufficient, Fred Cummings  
10 who's out of town this entire week.

11 And I know -- I don't know if they still  
12 intend to call Suman, but it's my understanding she's not  
13 available today or tomorrow. So I assume that they're  
14 going to ask for some day outside this week to call her as  
15 well, but I don't know that for a fact.

16 THE COURT: I understood that it was very  
17 probable that there would be another future date required.

18 Now, from the way things have gone today,  
19 I'm anticipating not being able to finish tomorrow unless  
20 y'all pick it up. So do you think you can get everybody  
21 else in that's currently available this week tomorrow or  
22 do you think --

23 MR. WARE: I think so.

24 MR. OTTOWAY: I note for the record that I  
25 was efficient.

1                   MR. BRAGG: Just a point of clarification,  
2                   Your Honor. We anticipate -- we will need to come back at  
3                   a later date for Suman. She is not available this week.  
4                   She had a prescheduled vacation out of state. Are we  
5                   anticipating that we might stay around an extra day as  
6                   well?

7                   THE COURT: If you don't finish tomorrow, I  
8                   would be okay, although I'm going to have to talk to the  
9                   coordinator about Wednesday, I mean, I will be down here  
10                  at one place or another on Wednesday if we don't finish  
11                  tomorrow, if it's convenient to get most of this in one  
12                  piece.

13                  MR. HAMPTON: Every lawyer may have his own  
14                  opinion, but I'm actually hopeful, unlike today, that we  
15                  actually can get through what we need to tomorrow.

16                  MR. WARE: I sure hope we do. I've got  
17                  other things to do the rest of the week, as I know  
18                  everybody does.

19                  THE COURT: Well, let me encourage y'all to  
20                  try to finish tomorrow if you can. And we'll just  
21                  schedule some future date for those two that you talked  
22                  about, Mr. Cummings and Suman, I guess is her name.

23                  MR. BRAGG: Yes, Your Honor.

24                  THE COURT: All right. Well, why don't we  
25                  recess until tomorrow and we'll see what we get done

1 tomorrow.

2 MR. OTTOWAY: Thank you, Your Honor.

3 (Proceedings adjourned)

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1 STATE OF TEXAS

2 COUNTY OF TARRANT

3 I, Lisa G. Morton, Deputy Official Court Reporter  
4 in and for Criminal District Court Number Three of Texas  
5 in and for Tarrant County, do hereby certify that the  
6 above and foregoing contains a true and correct  
7 transcription of all portions of evidence and other  
8 proceedings requested in writing by counsel for the  
9 parties to be included in this volume of the Reporter's  
10 Record in the above-styled and numbered cause, all of  
11 which occurred in open court or in chambers and were  
12 reported by me.

13 I further certify that this Reporter's Record of  
14 the proceedings truly and correctly reflects the exhibits,  
15 if any, offered by the respective parties, if requested.

16 I further certify that the total cost for the  
17 preparation of this Reporter's Record will be included in  
18 the final volume of this record.

19 WITNESS MY OFFICIAL HAND, on this the 10th of  
20 October, 2017.

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